2002

Myra Margis v. Bert Lietz : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MYRA MARGIS,

Plaintiff / Appellee,

v.

BERT LIETZ,

DEFENDANT / Appellant.

BRIEF OF APPELLEE

Appellate Case No. 20010783-CA

BRIEF OF APPELLEE

This is the Appellee's Brief in an appeal from a Post-Judgment Order in a civil case, entered in the Third District Court of Salt Lake County, State of Utah, the Honorable Leslie A. Lewis presiding.

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PLAINTIFF / APPELLEE (hereinafter "Plaintiff") submits the following as her brief in the above matter.

JURISDICTIONAL AUTHORITY

The Utah Court of Appeals has jurisdiction to review the Order entered by the trial court on August 22, 2001, (R. 467-471) in which the Court grants the Plaintiff's Motion to Strike an Order of Dismissal submitted by Defendant Bert Lietz *pro se* on March 12, 2001, and signed by the trial court on March 14, 2001 (R. 253-255).

Jurisdiction is proper pursuant to the Utah Rules of Appellate Procedure, Rules 3 and 4, and Utah Code Annotated, §78-2a-3(2)(j).

The Utah Court of Appeals does not have jurisdiction to review the trial court's Order entered on December 18, 2000, in which the trial court denied Defendant's Motion to Set Aside Judgment. (R. 214-215). Defendant had one month from the date of that final order to file a notice of appeal; Defendant filed a Notice of Appeal on September 20, 2001 (R. 471), nine months after the Court entered its final Order denying Defendant's Motion to Set Aside Judgment. Pursuant to the Utah Rules of Appellate Procedure, Rules 3 and 4, failure to file a timely notice of appeal leaves the appellate court with no jurisdiction to rule upon the merits of defendant / appellant's contentions. Peay v. Peay, 607 P.2d 841(Utah 1980).

In addition, the appellate court does not have authority to review the award of damages because that issue was never addressed or raised in the trial Court as part of the original 60(b) motion, but is raised for the first time on appeal. (R. 95-132). Katz v. Pierce, 41 Utah Adv. Rep. 12, 732 P.2d 92 (Utah 1986).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

Myra Margis objects to Defendant Bert Lietz's Statement of Issues on appeal, because it misstates the standard of review as well as the issues which are properly before this court for review.

The following issues are presented on appeal:

1. In its ruling of August 24, 2001, did the trial court err in striking the "Order of Dismissal" entered on March 14, 2001?

The question of whether trial court properly ordered that the "Order of Dismissal" be stricken under URCP 60(a) or (b) should be reviewed on appeal for an abuse of discretion. Bishop v. Gentec, Inc., 2002 UT 36 ¶ 27, 444 Utah Adv. Rep. 10; Lindsay v. Atkin, 680 P.2d 401, 402 (Utah 1984). Utah R. Civ P. 60.

Defendant Lietz limits his description of this issue to "whether the dismissal order was subject to correction as a clerical error," which he describes as "a question of law, to be reviewed for correctness." Appellant's Brief at 1.

2. Was a timely notice of appeal filed with respect to Defendant's Motion to Set Aside Judgment?

This is a jurisdictional question before the Appellate Court, which the court may address at any time, and which is before the Appellate Court *de novo*. Peay v. Peay, 607

P.2d 841(Utah 1980). This question is dispositive of Defendant's 2 nd issue on appeal, which is "Did the trial court err in refusing to set aside a default judgment against Lietz?" Appellant's Brief at 2.

3. In the event the appellate court is able to find jurisdiction to review Lietz's 2 nd issue on appeal, Plaintiff relies upon Defendant's statement of the issue, with the standard of review being abuse of discretion.

DETERMINATIVE PROVISIONS, STATUTES, AND RULES

The following rules are applicable to the disposition of this appeal and are included in the addendum to this brief: Utah R. Civ P. 60; Utah R. App. P. 3(a); Utah R. App. P. 4.

STATEMENT OF THE CASE

Plaintiff Myra Margis believes that Defendant Lietz catalogues all of the filings which have been submitted in this case. Appellant's Brief at 2-13. Plaintiff will attempt to condense this to a cohesive narrative.

Plaintiff Myra Margis filed a complaint against Defendant Bert Lietz on August 15, 1994, alleging generally that Margis had borrowed $7,000 from Lietz, posting the contents of the Carousel Social Club as collateral, and, despite Margis honoring all her obligations under the promissory note, Lietz wrongfully seized all of the contents of the

club, preventing its continued operation and preventing its sale as an ongoing enterprise to prospective purchasers (R. 1-13). Counsel for Lietz filed an Answer to the Complaint (R. 20-28), and the court eventually scheduled a trial for July 8, 1996, with a pretrial conference set for June 14, 1996 (R. 49).

At the pretrial conference of June 14, 1996, the parties reached an agreement as to how the case could be settled, with Lietz agreeing to pay Margis $750 and return all of the equipment and personal property taken from the Carousel Club which he had in his possession, and both parties agreeing to sign mutual releases of all claims and to have mutual restraining orders not to harass one another, with the return of property to Plaintiff to occur within 14 days. (T. 6/14/1996 at 3-9). Defendant Lietz did not comply with this settlement agreement (egregiously), so Plaintiff never signed or filed any release papers or filed any dismissal documents. The court was apprised of the failure of the settlement to be effectuated by a letter Margis (pro se) faxed to the trial court on November 9, 1997, criticizing her attorney and Lietz (R. 56-57). On January 5, 1998, the Court set the matter for a hearing on April 30, 1998, regarding the concerns raised by Margis' letter (R. 58). On January 7, 1998, the hearing was moved by the Court to May 7, 1998 (R. 59-63). On May 13, 1998, the Court moved the hearing date to August 14, 1998, after being notified that Lietz's counsel McPhee was on military duty and would

be unavailable until early July of 1998. (R. 64; 66). On May 13, 1998, the Court of its own initiative specifically ordered that "BOTH COUNSEL AND PARTIES WITH AUTHORITY TO SETTLE THE CASE MUST BE PRESENT," at the 8/14/98 hearing, with the threat of sanctions for failure to comply (R. 66). Each of the Court's Notices of Hearing except for that for the 8/14/98, specifically noted that Non-appearance of counsel "will result in pleadings being stricken and a default entered" (R. 58, 59-63, 64, 66, 79). The Court was further notified of Defendant Lietz's actions in failing to comply with the settlement agreement in Plaintiff's Motion for Contempt filed on July 31, 1998 (R. 72-74). On July 31, 1998, Plaintiff, through counsel, also filed a Notice of intent and attempts to enter settlement negotiations, which indicated that Defendant's named counsel McPhee was still out of state and unavailable to attend a hearing until August 24, 1998 (R. 75-76). Plaintiff's motion for contempt was never scheduled for hearing by the trial court (T. 8/14/1998, T. 8/21/1998).

Plaintiff Myra Margis drove from California to personally attend the August 14, 1998, hearing as ordered by the Court, and her counsel also attended the hearing (T. 8/14/1998). While Defendant's counsel McPhee did not attend the hearing, neither did any substitute counsel, and, most significantly, neither did the Defendant Bert Lietz. (T. 8/14/1998; R. 79). The Court awarded Plaintiff her travel costs and attorney fees for

attending the hearing, and the Court of its own initiative set another hearing for its next open date, August 21, 1998 (T. 8/14/1998; R. 79). The court specifically ordered that "failure to appear by the defendant or an attorney for defendant (Mr. McPhie or partners) will result in the defendant pleadings being stricken and a judgment will enter for the plaintiff, " with the Plaintiff allowed to appear by telephone so that she wouldn't be forced to drive from California again (T. 8/14/1998; R. 79). The Court ordered service of notice of the hearing both by mail and fax, both by Plaintiff's attorney and by the Court, on Defendant's attorney McPhee (T. 8/14/1998; R. 79). The court refrained from entering judgment for the Plaintiff as a sanction on 8/14/1996 simply because the court was concerned that adequate notice of that particular sanction had not been provided to Defendant, and the Court wanted to be sure that sanctions against the Defendant for failure to appear would "stick," which was the Court's explanation for giving Defendant Lietz or counsel another opportunity to appear at another hearing (T. 8/14/1998).

On August 21, 1998, Plaintiff's Counsel appeared at the Court's scheduled hearing but neither Defendant Lietz appeared, nor did any counsel on his behalf. The Court found that notice had been delivered to Defendant's Counsel McPhee, both by the court and by Plaintiff's counsel. The Court ordered that Defendant's pleadings be stricken, and that judgment be entered against Defendant in the amount of $67,200 plus

attorney fees (T. 8/21/1998; R. 88). This was reduced to an Order and Judgment prepared by Plaintiff's counsel and signed by the Court on August 28, 1998 (R. 89-90).

On September 2, 1998, counsel for Lietz filed a Motion to Set Aside Judgment and Award of Attorney fees, submitting a memorandum and affidavit in support which explained counsel's inability to personally attend the hearings of 8/14/1998 and 8/21/1998, but which provided no explanation as to the failure of Defendant Lietz to personally attend either of the hearings as specifically ordered by the Court, or why alternate counsel did not attend (R. 95-132).

The Court did not rule on (and deny) Defendant's Motion to Set Aside Judgment until October 27, 2000 (R. 201), in accordance with the court's order of 8/14/1998, that the case would not "proceed to trial or hearing" until Defendant Lietz paid Plaintiff's costs and attorney fees for appearing at that day's hearing when Defendant Lietz did not (R. 79).

In the interim, Counsel McPhee for Defendant filed two notices to submit concerning the Motion to Set Aside Judgment (R. 133; 189-93). Lietz was ordered to appear on two separate occasions in supplemental proceedings (R. 154-55; 183-84). Counsel Ziter appeared on behalf of Lietz, filed a motion for a hearing on the Motion to Set Aside Judgment, and withdrew from representing Lietz (R. 153; 151; 181).

Defendant Lietz *pro se*, although represented by both McPhee and Ziter at the time, filed a motion to dismiss the action for a defective summons and failure to comply with URCP 3(a) and 4(c)(2) (R. 160-171), after which Ziter withdrew as Lietz's counsel. Counsel for Plaintiff filed a response to Defendant's *pro se* motion to dismiss, and shortly afterward a motion for Rule 11 sanctions, at which time Defendant Lietz *pro se* withdrew the motion to dismiss (R. 175-79; 196-98; 199). Counsel for Plaintiff filed a request for a hearing on Defendant's Motion to Set Aside Judgment (R. 158), and Plaintiff Margis *pro se* wrote a letter to the court expressing her displeasure with Defendant Lietz and his counsel (R. 145-47). Defendant Lietz finally tendered the ordered sanctions of $980.00 to the court at a supplemental proceeding on October 5, 2000, along with $300.00 held towards the judgment against Lietz (R. 193).

Shortly after Lietz paid the $980.00 in sanctions into the Court, on October 27, 2000, the Court signed a minute entry denying Defendant's Motion to Set Aside the Judgment (R. 201). Both counsel for Plaintiff and Defendant submitted proposed Orders and Objections to the countervailing proposed Orders, (R. 207-208; 209-210), and Counsel for Lietz objected to releasing to Plaintiff Margis the $1280.00 held by the Court (R. 211-13).

On December 18, 2000, the Court signed the Order submitted by Plaintiff's Counsel, which stated that the "Defendant's Motion to Set Aside Judgment and Award of Attorney Fees came before this Court on the Defendant's second Notice to Submit on October 6, 2000. . . . The Court after having considered the motion and reviewing all the pleadings and the Court's file, the Court denies the motion. The previous Order and Award of Fees remains in place" (R. 214), which quoted the court's language of the minute entry (R. 201). The Court also signed another Order Releasing Funds ordering that the $1280 held by the court be paid to Plaintiff, representing $980 in sanctions and $300 paid towards the Judgment (R. 223).

The Court entered a final order specifically denying Defendant's Motion to Set Aside Judgment on December 18, 2000 (R. 214-15), but Defendant did not file a notice of appeal until September 20, 2001 (R. 476).

Despite the entry of the Court's Order on December 18, 2000, affirming the Judgment entered on August 28, 1998, and denying Defendant's Motion to Set Aside the Judgment (R. 214-15), and the Order Releasing Funds of December 18, 2001 (R.223), on February 6, 2001, counsel for Lietz filed a Notice to Submit a host of prior motions which were all clearly resolved or rendered moot by the Court's Orders: these included objections to both Orders which had been signed by the Court; a Motion to Strike

Plaintiff's response to Defendant's motion to set aside the judgment; and Plaintiff's motion to release funds (R. 227-243). The subject matter of all these motions and objections, all filed before December 18, 2000, were all resolved by the Orders entered by the Court on December 18, 2000 (R. 214-15; 223; 467-471).

The Third District Court Clerk's log indicates that Defendant's Counsel's Notice to Submit of February 2, 2001, was delivered to the Court for Decision on March 12, 2001. On that same day Defendant Lietz, acting *pro se*, submitted an Order of Dismissal to the Court, which described the parties as having reached an accord and satisfaction on 14 June 1996, that all elements of that agreement had been satisfied, and that the case should be dismissed with prejudice effective 14 June 1996 (R. 253-255). On March 14, 2001, the court signed the Order of Dismissal prepared and submitted by the Defendant *pro se* two days earlier, on March 12, 2001 (R. 253-255). On its face the Order of Dismissal appeared to contradict all of the rulings of the trial court for the previous three years.

Plaintiff obtained a Writ of Garnishment for First Security Bank on April 10, 2001, and subsequently another Writ of Garnishment for America First Credit Union on June 26, 2001 (R.345-363). On July 5, 2001, counsel for Lietz moved to quash and recall the Writ of Garnishment for America First Credit Union, based on the dismissal

order signed March 14, 2001 (R. 363-371). Counsel for Plaintiff Margis filed a response to the Defendant's motion to quash on July 15, 2001 (R. 431-442), and Defendant requested an enlargement of time to file a reply on July 20, 2001 (R. 443-44).

On July 15, 2001, Counsel for Plaintiff filed a Motion to Strike the Order of Dismissal under Utah R. Civ. P. 60(a) or (b), with arguments for several alternative grounds, but primarily as a clerical error in that the Order of Dismissal rendered the previous Orders relating to the judgment entered against the Defendant unclear, as judgment was entered against the Defendant as sanctions for failing to comply with the settlement agreement and subsequent orders of the Court after 14 June 1996 (R. 372-430). Defendant never opposed or filed any response to Plaintiff's Motion to Strike Order, which the court subsequently granted (R. 470-71).

Plaintiff filed a notice to submit of the Motion to Strike Order, and of Defendant's Motion to Quash, on August 3, 2001 (R. 445). Then on August 13, 2001, Defendant filed a reply to Plaintiff's response to Defendant's Motion to Quash (R. 448-454), and Defendant moved to strike all of Plaintiff's pleadings after October 10, 2000 (R. 455-456). On August 16, 2001, Defendant then filed his own notice to submit the Defendant's Motion to Strike, the Motion to Quash, and the Motion to Enlarge Time (R. 461- 66). Defendant did not respond to Plaintiff's Motion to Strike Order.

On August 22, 2001, the Court entered its "Court's Ruling," striking the Order of Dismissal signed on March 14, 2001 (R. 470-71). The Court described in detail its reasoning for striking the Order of Dismissal, as well as how it initially entered the Order of Dismissal. The Court does not specify whether it is ruling under URCP 60(a) or (b), but states two distinct reasons for striking the order of dismissal: 1, " The Court now determines that the Order of Dismissal does conflict with the prior Judgment and Order"; 2. "In addition, it is not clear to the Court that the parties ever reached an accord and satisfaction" (R. 470, emphasis in original). The Court noted the confusion created by Defendant Lietz filing pro se documents at the same time that he was represented by one and two separate attorneys (R. 468-69, 471). The Court also described the history of the case, affirmed that all of Defendant's subsidiary motions and objections had been denied with the Orders of December 18 and 19, 2000, and denied Defendant's Motion to Quash and Motion to Strike (R. 467-71).

On September 20, 2001, Defendant Lietz, by counsel, filed a notice of appeal of the "Court's Ruling" of August 22, 2001. (R. 476).

STATEMENT OF THE FACTS

Defendant Lietz states that "there are no additional facts in the record to consider pertaining to this appeal, other than those stated in the Statement of the Case"

(Appellant's Brief at 13). Defendant Lietz fails to cite or provide transcripts of the hearings of August 14, 1998, and August 21, 1998, when the Court made its findings of fact and ordered that judgment be entered against the Defendant Lietz. Defendant Lietz's failure to marshal the evidence concerning these two hearings are particularly problematic because of Defendant's allegations on appeal that Judgment was entered against Lietz because of out-of-court contempt (Appellant's Brief at 24-5, 36-7), when the transcripts of the 8/14/98 and 8/21/98 hearings (as well as the notice of the 8/14/1998 hearing prepared by the Court on May 13, 1998), demonstrate that the court's sanctions and entry of judgment against Defendant Lietz were for Lietz's (or counsel's) personal failure to appear before the Court, as specifically ordered by the Court. The facts not marshaled would indicate that the Court's sanctions and entry of Judgment against Defendant Lietz were for his failure to appear for the Court's duly noticed and scheduled hearings.

Defendant Lietz also does not describe the allegations made to the Court by Plaintiff and by Plaintiff's counsel concerning Lietz's failure to comply with the initial settlement agreement, in which Lietz failed to sign an inventory of the items he had provided to Plaintiff, that Lietz ripped the settlement check from Plaintiff's attorney's hand and drove away, nearly knocking down Plaintiff's attorney Nathan Pace with his

truck. For the next two years Defendant refused to redeliver the check or participate in attempts to comply with the settlement agreement. (R. 56-57, 72-74, 145-47).

SUMMARY OF THE ARGUMENT

It was not an abuse of discretion for the Court to grant Plaintiff's Motion to Strike Order, concerning the Order of Dismissal signed March 14, 2001, because the Motion to Strike Order was not opposed by Defendant. The accurate record of the Court should indicate that although a settlement agreement was reached on June 14, 1996, the case was never dismissed (because of non-completion of the terms of the agreement), and judgment was eventually entered against defendant because of non-compliance with Orders by the Court to appear before the Court.

The trial Court's accurate determination "that the Order of Dismissal does conflict with the prior Judgment and Order" (R. 470) indicates that the Court's ruling fell under URCP 60(a), to correct the appearance of an oversight in the record, or under URCP 60(b)(6) in order to clarify the Court's record regarding the judgment. The Court's additional finding that "it is not clear to the Court that the parties ever reached an accord and satisfaction" (R. 470), also points to alternative grounds to strike the Order pursuant to URCP 60(a), to correct the appearance of an oversight in the record, or under URCP 60(b)(6) in order to clarify the Court's record regarding the judgment. To address both

concerns, the Court struck the Order of Dismissal which had left the record of the case unclear, and clarified the record of the case in its "Court's Ruling" entered on August 22, 2001 (R. 467-71).

In appealing the Court's grant of Plaintiff's Motion to Strike Order, Defendant fails to marshal any evidence which supports the Trial Court's rulings, and fails to point out any fatal flaw in the Trial Court's reasoning, which would be the basis for finding an abuse of discretion. As such the burden of the appeal is not met and must be dismissed.

The Utah Court of Appeals does not have jurisdiction to review the trial court's Order entered on December 18, 2000, in which the trial court denied Defendant's Motion to Set Aside Judgment. (R. 214-215). Defendant devotes the balance of his appeal attempting to argue that "the trial court erred in refusing to set aside the Default Judgment" and discussing the Defendant's Motion to Set Aside Judgment and Award of Attorney Fees (Appellant's Brief at 23-32), which was filed by Defendant on September 2, 1998, (R. 95-132) and specifically denied by the Trial Court in its Order entered on December 18, 2000 (R. 214). Pursuant to the Utah Rules of Appellate Procedure, Rules 3 and 4, failure to file a timely notice of appeal leaves the appellate court with no jurisdiction to rule upon the merits of defendant / appellant's contentions. Peay v. Peay, 607 P.2d 841(Utah 1980).

In the event the appellate Court reaches the merits of the question of whether the trial Court erred in refusing to set aside a default judgment against Lietz, the trial Court did not abuse its discretion, in that Defendant presents no argument or explanation for why Defendant Lietz did not personally appear at the court-ordered hearings, as ordered by the Court.

Defendant also fails to marshal any of the evidence, or discuss the findings of the trial court at the hearings of 8/14/1998 and 8/21/1998, concerning the court's orders of sanctions for Defendant Lietz to appear, regardless of the actions or ability of his named counsel to appear. Without marshaling the evidence or pointing out any fatal flaw in the Court's reasoning, the court's factual findings must be accepted as true.

Defendant raises the issue of damages for the first time on appeal, so the issue is not properly before the Court of Appeals. Also concerning Defendant's discussion of the damages awarded, or the need for affidavits to support damages, Defendant does not marshal, present, or address any evidence of the testimony taken by the trial court from the Plaintiff at the hearings of 8/14/1998 and 8/21/1998 concerning the propriety and sufficiency of the damages requested in the Complaint.

Concerning the allegations of indirect contempt, the hearing of August 14, 1998, was ordered by the Court as a pretrial conference on May 13, 1998 (R.66). No contempt

was cited by the court as justification for its orders, and any contempt would have been in-court contempt for failure to appear. Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988). By any means, the Court did not abuse its discretion in refusing to set aside the Judgment entered against Defendant, as the Court's specific purpose in setting an additional hearing on August 21, 1998, was to ensure that the Court's actions were proper and would not be amenable to attack on appeal. (T. 8/14/1998; T. 8/21/1998).

ARGUMENT

POINT 1 THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING PLAINTIFF'S MOTION TO STRIKE ORDER, BECAUSE PLAINTIFF'S MOTION WAS UNOPPOSED.

It was not an abuse of discretion for the Court to grant Plaintiff's Motion to Strike Order, concerning the Order of Dismissal signed March 14, 2001, because the Motion to Strike Order was not opposed by Defendant. Defendant did not file any response to Plaintiff's Motion to Strike Order, and Plaintiff's motion was ruled on properly as the subject of a Notice to Submit (R. 445). The court found valid reasons to strike the Order of dismissal, and its discretion should not be disturbed.

POINT 2 THE TRIAL COURT ACCURATELY DETERMINED THAT THE ORDER OF DISMISSAL WAS SUBJECT TO CORRECTION UNDER URCP 60(a) and (b)(6).

The trial Court's accurate determination "that the Order of Dismissal does conflict with the prior Judgment and Order" (R. 470) indicates that the Court's ruling fell under URCP 60(a), to correct the appearance of an oversight in the record, or under URCP 60(b)(6) in order to clarify the Court's record regarding the judgment. The Court's additional finding that "it is not clear to the Court that the parties ever reached an accord and satisfaction" (R. 470), also points to alternative grounds to strike the Order pursuant to URCP 60(a), to correct the appearance of an oversight in the record, or under URCP 60(b)(6) in order to clarify the Court's record regarding the judgment. To address both concerns, the Court struck the Order of Dismissal which had left the record of the case unclear, and clarified the record of the case in its "Court's Ruling" entered on August 22, 2001 (R. 467-71).

DEFENDANT'S ORDER OF DISMISSAL OF MARCH 14, 2001, COULD BE STRICKEN OR AMENDED IN ORDER TO CLARIFY THE STATUS OF THE COURT'S ORDERS, AS "ANY OTHER REASON" PURSUANT TO URCP 60(b)(6)

The Trial Court entered Judgment against the Defendant on August 28, 1998, even though the parties had previously reached a settlement agreement. While the Third District Court Clerk's record still accurately reflected that a valid judgment had been entered against the Defendant, the presence of an Order of Dismissal in the record

effective two years prior to the Entry of Judgment created the possibility of confusion regarding the Court's orders. The Defendant filed a motion to quash a valid garnishment based on the Order of Dismissal. Because of confusion created, the trial Court had the authority to clarify the order under the authority of URCP 60(b)(6).

"A Motion for 'Clarification of Judgment' is not specifically provided for in the Utah Rules of Civil Procedure. However, the substance of the motion is to make clear a judgment that it is not already clear. If the clarity of the judgment is called into question because the opposing party is improperly applying the judgment, then implicit in the motion is a request to change the judgment to provide relief to a party harmed by the lack of clarity. Accordingly, we hold that in the case before us, appellees motion for clarification, in which appellants joined, was sufficient to invoke Rule 60(b)." Kunzler v. O'dell, 215 Utah Adv. Rep. 57, 855 P.2d 270 (Ct. App. 1993).

"A court may grant relief under subsection [six] of Rule 60(b) for any reason other than the first [five] enumerated by the rule if relief is justified, and the motion is made within a reasonable time." Utah R. Civ. P. 60(b); Richins v. Delbert Chipman & Sons Co., Inc., 817 P.2d 382, 387 (Utah App. 1991). Kunzler v. O'dell. Plaintiff does not claim "(1) Mistake, inadvertence, surprise, or excusable neglect;" as the basis of this 60(b) motion because the Judgment entered against Defendant on August 28, 1998, was

correctly not affected by the Order of Dismissal. Two valid garnishments were issued by the Court subsequent to the Defendant's Order of Dismissal, one on April 10, 2001, and one on June 26, 2001. The motion was also not based on "(3) fraud." The 60(b)(6) motion was for the purpose of clarifying the Court's Record concerning the Order of Dismissal, so that it remained clear to Court personnel or other judges evaluating the validity of writs of garnishment that a valid Judgment has been entered and affirmed by this court (on December 18, 2000), despite the entry of dismissal at a prior date.

For greatest clarity of the record, the Order of Dismissal was stricken, with a new Order prepared which clearly describes the record of this Case. The trial Court corrected the Order to reflect that despite the previous settlement agreement, a Judgment was subsequently entered against Defendant.

Relief under URCP 60 (a) may be sought "at any time." Relief under URCP 60 (b)(6) must be sought within "a reasonable time." The Court issued two valid garnishments since the entry of the Order of Dismissal. Defendant created an apparent need for clarification of the Order of Dismissal by filing a Motion to Quash the last Writ of Garnishment. The Motion to Strike was filed four months after the Order was signed, and less than one week after Plaintiff first received actual notice of the Order of Dismissal. No party was prejudiced in the passage of time from the signing of the Order

of Dismissal. Plaintiff's Motion to Strike the Order of dismissal under URCP 60(b)(6) was timely.

THE TRIAL COURT PROPERLY RECOGNIZED THAT THE ORDER OF DISMISSAL PREPARED BY PLAINTIFF PRO SE INCORRECTLY STATED THAT AN ACCORD AND SATISFACTION HAD BEEN REACHED IN THE CASE, PURSUANT TO URCP 60(a), THE COURT STRUCK THE ORDER TO PREVENT THE APPEARANCE OF A MISTAKE IN THE RECORD

URCP 60(a) provides that clerical errors in orders may be corrected at any time. A Clerical amendment to an order "is one which is intended to make the judgment speak the truth by showing what the judicial action really was. . ." Richards v. Siddoway, 24 Utah 2d 314, 471 P.2d 143 (Utah 1970). A clerical error is not a "judicial error"; A clerical amendment cannot correct a judicial decision by "making [a judgment] express something which the court did not pronounce, and did not intend to pronounce, in the first instance." Richards. The trial Court found that the Defendant's Order of Dismissal did not accurately reflect the actual rulings of the Court, and as such was subject to being stricken or corrected.

The Defendant's Order of Dismissal decreed that "the parties did reach an accord and satisfaction in this matter." The record of the hearing on June 14, 1996, indicates

that while the Court recognized that an agreement for settlement was reached (an accord), satisfaction of that agreement was never provided. The extensive proceedings following that hearing, and the Court's eventual entering of Judgment against the Defendant on August 28, 1998, are the result of the Court's actual determination that the Defendant had not complied with or provided satisfaction to that settlement agreement and subsequent court orders.

If a judge erroneously assumes that an order presented by a party and signed by the judge correctly reflects the judge's Judgment, that is a mistake of a perfunctory or clerical nature which the court can and properly should correct upon its own motion. Meagher v. Equity Oil Co., 5 Utah 2d 196, 299 P.2d 827 (1956). In this case the Court explicitly determined that the Order prepared by Plaintiff Pro Se and signed by the Court did not accurately reflect the Judgments entered in this case, so it was stricken by the Court (R. 470).

Defendant's Order of Dismissal states that an accord and satisfaction was completed on June 14, 1996. While an initial settlement agreement was reached in court, Satisfaction was never delivered. Defendant did not comply with the settlement agreement or with further court orders. As partial sanctions for Defendant's non-compliance, Defendant's Answer was stricken and judgment was entered against him.

As sanctions for Defendant's non-compliance, the settlement agreement and the potential dismissal of the case was voided. While an order could be entered reflecting the court hearing of June14, 1996, the Order of Dismissal does not clearly reflect the status of this case. The Order of the case should reflect that notwithstanding the settlement agreement, Judgment was entered against Plaintiff on August 28, 1998. To correct the appearance of an oversight in the record, the Court properly struck the Defendant's Order of Dismissal and entered its own Order to reflect that Judgment was subsequently entered against Defendant. URCP 60(a) again provides that the Court may make this correction at any time of its own initiative.

THE ORDER OF MARCH 14, 2001, WAS SIGNED AS A CLERICAL ERROR BY THE COURT, AND WAS VALIDLY STRICKEN PURSUANT TO URCP 60(a)

Even though a valid Judgment remained in place against Defendant, the Order of Dismissal was signed as a mistake or clerical error by the Court. On February 2, 2001, Defendant's Counsel submitted a Notice to Submit encompassing seven different procedural motions, objections, and orders. Court records indicate that on March 12, 2001, the Notice to Submit was delivered to Judge Lewis for ruling, on the same day that Defendant pro se filed a totally separate Order of Dismissal with the Court. Plaintiff's counsel never received a copy of this order or was given any opportunity to respond to

the order. On March 14, 2001, at most two days after being filed, that Order of Dismissal was signed by the Court, although it was never the subject of any Notice to Submit or other Motion before the court.

URCP 60(a) allows that clerical mistakes in "orders or other parts of the record and errors therein arising from oversight . . .may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." As a clerical error or mistake, the signed Order of Dismissal could be stricken by the Court immediately. The trial Court did not specifically state whether it was striking the Order of Dismissal as a clerical error, but it had the authority to do so.

POINT 3 DEFENDANT LIETZ FAILS TO MARSHAL ANY EVIDENCE DEMONSTRATING THE TRIAL COURT'S ERROR IN STRIKING THE ORDER OF DISMISSAL.

"As a prerequisite to an appellant's attack on finding of fact, appellant must marshal all the evidence in support of the findings and demonstrate 'that the evidence, including all reasonable inferences drawn therefrom, is sufficient to support the findings.'" Robb v. Anderton, 863 P.2d 1322, 1328 (Utah App. 1993). Compliance with the marshaling step is mandatory, State v. Larsen, 828 P.2d 487, 491 (Utah App.) aff'd, cert granted, 865 P.2d 1355 (Utah 1993) ("Our insistence on compliance with the

marshaling requirement is not a case of exalting hypertechnical adherence to form over substance."), and the standard for compliance is high. West Valley City v. Majestic Inv. Co., 818 P.2d 1311 (Utah App. 1991).

> In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.

Id. at 1315.

Additionally, simply listing the evidence is not enough. Once the supporting evidence is listed with appropriate citation to the record, the appellant must also demonstrate that the marshaled evidence is legally insufficient to support the findings when viewing the evidence and inferences in a light most favorable to the decision. Stewart v. Board of Review, 831 P.2d 134, 138 (Utah App. 1992). To do this, appellant must point to a specific "fatal flaw" in the evidence upon which the trial court based its decision, and "convince the appellate court that the court's finding resting upon the evidence is clearly erroneous." West Valley City, 818 P.2d at 1315. See also Stewart, 831 P.2d at 138 (after coming "close" to marshaling evidence, appellant fails to "draw this court's attention to any flaw in the evidence upon which the [administrative law judge] relied").

If an appellant fails to properly marshal the evidence, the appellate court must assume that the findings are correct and supported by the evidence. e.g., Crockett v. Crockett, 836 P.2d 818, 820 (Utah 1992). Appellate courts have shown no reluctance in affirming the findings of the trial court where appellant does not properly marshal the evidence. See Ong Int'l (U.S.A), Inc. v. 11th Ave. Corp., 850 P.2d 447, 457 (Utah 1993); Robb, 863 P.2d at 1328; West Valley City, 818 P.2d at 1313.

Here, Defendant Lietz does not even attempt to marshal the evidence in support of the trial court's findings. Appellant's Brief at 13. Nowhere in Defendant Lietz's argument does he address a single piece of evidence supporting the trial court's decision. Appellant's Brief at 14-32. Furthermore, Defendant Lietz never cites a single finding of fact or conclusion of law. Id. Instead, Defendant Lietz merely repeats the arguments he made to the trial court. Id. Essentially, Defendant Lietz treats this Court as if it were "simply a depository" into which it can "dump the burden of argument and research," Larsen, 828 P.2d at 491, which is exactly what the marshaling requirement was designed to prevent. Id. Accordingly, Plaintiff Margis respectfully submits that Defendant Lietz's failure to marshal the evidence compels this Court to affirm the trial court's Order Striking the Order of Dismissal.

In appealing the Court's grant of Plaintiff's Motion to Strike Order, Defendant fails to marshal any evidence which supports the Trial Court's rulings, and fails to point out any fatal flaw in the Trial Court's reasoning, which would be the basis for finding an abuse of discretion. As such the burden of the appeal is not met and must be dismissed.

POINT 4 THE UTAH COURT OF APPEALS DOES NOT HAVE JURISDICTION TO REVIEW THE TRIAL COURT'S ORDER ENTERED ON DECEMBER 18, 2000, IN WHICH THE TRIAL COURT DENIED DEFENDANT'S MOTION TO SET ASIDE JUDGMENT.

Defendant did not file any notice of appeal relating to the Order denying Defendant's Motion to Set Aside Judgment, signed on December 18, 2000 (R. 214-215). The Final Order in this case was signed August 28, 1998, and Defendant Lietz did not file an appeal of that Judgment. Defendant devotes the balance of his appeal attempting to argue that "the trial court erred in refusing to set aside the Default Judgment" and discussing the Defendant's Motion to Set Aside Judgment and Award of Attorney Fees (Appellant's Brief at 23-32), which was filed by Defendant on September 2, 1998, (R. 95-132) and specifically denied by the Trial Court in its Order entered on December 18, 2000 (R. 214). Defendant did not appeal that specific and final order.

Although Defendant conceivably asked for reconsideration of the court's order, concerning a "motion to reconsider," the Utah Supreme Court is "unaware of any such motion under our rules" Peay v. Peay, 607 P.2d 841(Utah 1980), citing Utah State Employees Credit Union v. Riding, 24 Utah 2d 211, 469 P.2d 1 (1970). Although Defendant had one month from the date of that final order to file a notice of appeal, Defendant filed a Notice of Appeal on September 20, 2001 (R. 471), nine months after the Court entered its final Order denying Defendant's Motion to Set Aside Judgment. Defendant did not file any intervening motion which tolled the time for filing an appeal. "The Trial Court is not to be in a position of acting as a court of review of its own ruling," Peay, citing Drury v. Lunceford, 18 Utah 2d 74, 415 P.2d 662 (1966). Pursuant to the Utah Rules of Appellate Procedure, Rules 3 and 4, failure to file a timely notice of appeal leaves the appellate court with no jurisdiction to rule upon the merits of defendant / appellant's contentions. Peay v. Peay, 607 P.2d 841(Utah 1980).

POINT 5 THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO SET ASIDE THE JUDGMENT, AS DEFENDANT AGAIN DOES NOT MARSHAL ANY EVIDENCE CONCERNING DEFENDANT LIETZ'S FAILURE TO APPEAR

In the event the appellate Court reaches the merits of the question of whether the trial Court erred in refusing to set aside a default judgment against Lietz, the trial Court did not abuse its discretion, in that Defendant presents no argument or explanation for why Defendant Lietz did not personally appear at the court-ordered hearings, as ordered by the Court.

Defendant fails to marshal any of the evidence, or discuss the findings of the trial court at the hearings of 8/14/1998 and 8/21/1998, concerning the court's orders of sanctions for Defendant Lietz to appear, regardless of the actions or ability of his named counsel to appear. Without marshaling the evidence or pointing out any fatal flaw in the Court's reasoning, the court's factual findings must be accepted as true. With the same argument previously made concerning the duty to marshal the evidence, Plaintiff Margis respectfully submits that Defendant Lietz's failure to marshal the evidence compels this Court to affirm the trial court's Order Denying Defendant's Motion to Set Aside the Judgment.

POINT 6 APPELLATE COURT CANNOT REVIEW THE AMOUNT OF THE AWARD OF DAMAGES BECAUSE THE ISSUE WAS NOT RAISED IN THE TRIAL COURT, AND DEFENDANT AGAIN FAILS TO MARSHAL THE EVIDENCE

The appellate court does not have authority to review the award of damages because that issue was never addressed or raised in the trial Court as part of the original 60(b) motion, but is raised for the first time on appeal. (R. 95-132). Katz v. Pierce, 41 Utah Adv. Rep. 12, 732 P.2d 92 (Utah 1986). Also concerning Defendant's discussion of the damages awarded, or the need for affidavits to support damages, Defendant does not marshal, present, or address any evidence of the testimony taken by the trial court from the Plaintiff at the hearings of 8/14/1998 and 8/21/1998 concerning the propriety and sufficiency of the damages requested in the Complaint.

POINT 7 CONTEMPT WAS NEVER ORDERED OR ADDRESSED BY THE TRIAL COURT IN ENTERING JUDGMENT

Concerning the allegations of indirect contempt, the hearing of August 14, 1998, was ordered by the Court as a pretrial conference on May 13, 1998 (R.66). No contempt was cited by the court as justification for its orders, and any contempt would have been in-court contempt for failure to appear. Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988).

CONCLUSION

Defendant Lietz filed a timely notice of appeal solely as to one issue, the Motion to Strike Defendant's Order of Dismissal, and that motion was granted on several grounds by the Trial Court after being unopposed by Defendant. Defendant Lietz fails to marshal any evidence as to why it was an abuse of discretion for the trial court to Strike the Order of Dismissal.

The Appellate Court does not have jurisdiction to review the trial court's denial of Defendant's Motion to Set Aside the Judgment, because the final order regarding that motion was entered on December 18, 2000, nine months before a notice of appeal was filed in this case. Regardless Defendant has failed to marshal the evidence concerning the trial court's denial of that motion.

Plaintiff Myra Margis respectfully requests the Court of Appeals to deny Defendant Lietz's Appeal and award her costs on appeal.

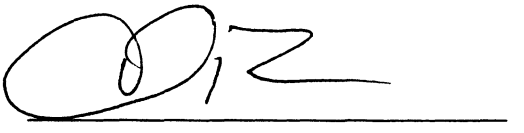
RESPECTFULLY SUBMITTED this 4 day of September, 2002.

DAVID S. PACE
NATHAN D. PACE
Attorneys for Appellee/Plaintiff

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I delivered by first class mail, postage prepaid, two copies of the foregoing Brief of Plaintiff / Appellee on 4 day of September, 2002 to:

JEROLD D. MCPHEE
320 SOUTH 300 EAST, SUITE 200
SALT LAKE CITY, UT 84111-2537
Attorney for Defendant / Appellant



settlement of civil case, 6 A.L.R.3d 1457.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 A.L.R.3d 1000.

Quotient verdicts, 8 A.L.R.3d 335.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 A.L.R.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages — modern cases, 5 A.L.R.5th 875.

After-acquired evidence of employee's misconduct as barring or limiting recovery in action for wrongful discharge, 34 A.L.R.5th 699.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 59 A.L.R.5th 1.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx. § 688) or doctrine of unseaworthiness — modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq.) — modern cases, 97 A.L.R. Fed. 189.

Rule 60. Relief from judgment or order.

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.
(Amended effective April 1, 1998.)

Advisory Committee Note. — The 1998 amendment eliminates as grounds for a motion the following: "(4) when, for any cause, the summons in an action has not been served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action." This basis for a motion is not found

clearly meritorious, it would support a suspension of the time limitation contained in Rule 10, Utah R. App. P. Bailey v. Adams, 798 P.2d 1142 (Utah Ct. App. 1990).

Cited in Dulin v. Cook, 957 F.2d 758 (10th Cir. 1992).

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS

Rule 3. Appeal as of right: how taken.

(a) *Filing appeal from final orders and judgments.* An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) *Joint or consolidated appeals.* If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) *Designation of parties.* The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) *Content of notice of appeal.* The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) *Service of notice of appeal.* The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at the party's last known address. A certificate evidencing such service shall be filed with the notice of appeal. If counsel of record is served, the certificate of service shall designate the name of the party represented by that counsel.

(f) *Filing fee in civil appeals.* At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court the filing fee established by law. The clerk of the trial court shall not accept a notice of appeal unless the filing fee is paid.

(g) *Docketing of appeal.* Upon the filing of the notice of appeal and payment of the required fee, the clerk of the trial court shall immediately transmit a certified copy of the notice of appeal, showing the date of its filing, and a copy of the bond required by Rule 6 or a certification by the clerk that the bond has been filed, to the clerk of the appellate court. Upon receipt of the copy of the notice of appeal, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not

an appeal may be taken. Salt Lake City Corp. v. Layton, 600 P.2d 538 (Utah 1979).

A partial summary judgment is not generally a final judgment and hence it is not appealable under the limitations prescribed by this rule. South Shores Concession, Inc. v. State, 600 P.2d 550 (Utah 1979).

District court order setting aside certain provisions in a default decree of divorce and providing for a further hearing on the matter was not a final ruling from which an appeal could be taken. Pearson v. Pearson, 641 P.2d 103 (Utah 1982).

Postjudgment orders.

An order vacating a judgment is not a final order from which an appeal can be taken pursuant to this rule. Van Wagenen v. Walker, 597 P.2d 1327 (Utah 1979).

The final judgment rule does not preclude review of postjudgment orders; such orders were independently subject to the test of finality, according to their own substance and effect. Cahoon v. Cahoon, 641 P.2d 140 (Utah 1982).

Purpose of notice.

The object of a notice of appeal is to advise the opposite party that an appeal has been taken from a specific judgment in a particular case. Nunley v. Stan Katz Real Estate, Inc., 15 Utah 2d 126, 388 P.2d 798 (1964).

Review in equity cases.

In the appeal of an equity case, the Supreme Court may weigh the facts as well as review the law, but will reverse on the facts only when the evidence clearly preponderates against the findings of the trial court. Crimmins v. Simonds, 636 P.2d 478 (Utah 1981).

In reviewing trial court's findings of fact in equity cases, the Supreme Court would give due deference to the trial court's decision and reverse only when the evidence clearly preponderated against the trial court's findings. Jensen v. Brown, 639 P.2d 150 (Utah 1981).

Review of acquittal prohibited.

An appellate court may not reassess an acquittal even though the acquittal was made under an incorrect application of the law or an improper determination of the facts. State v. Musselman, 667 P.2d 1061 (Utah 1983).

Summary judgment.

Order setting aside summary judgment was not final judgment from which aggrieved person might appeal as matter of right. Jensen v. Nielsen, 22 Utah 2d 23, 447 P.2d 906 (1968).

Order denying a motion for summary judgment was not a final order and was not appealable. Denison v. Crown Toyota Motors, Inc., 571 P.2d 1359 (Utah 1977).

A summary judgment in favor of one defendant alone is not a final judgment where the action against the remaining defendant remains alive. Neider v. State DOT, 665 P.2d 1306 (Utah 1983).

Unsigned minute entry.

An unsigned minute entry did not constitute an entry of judgment, nor was it a final judgment for purposes of appeal. Wilson v. Manning, 645 P.2d 655 (Utah 1982); Utah State Tax Comm'n v. Erekson, 714 P.2d 1151 (Utah 1986); Sather v. Gross, 727 P.2d 212 (Utah 1986); Ahlstrom v. Anderson, 728 P.2d 979 (Utah 1986).

An unsigned minute entry does not constitute a final order for purposes of appeal. State v. Crowley, 737 P.2d 198 (Utah 1987).

Cited in Huston v. Lewis, 818 P.2d 531 (Utah 1991); Boggs v. Boggs, 824 P.2d 478 (Utah Ct. App. 1991); Sierra Club v. Utah Solid & Hazardous Waste Control Bd., 964 P.2d 335 (Utah Ct. App. 1998); City of Kanab v. Guskey, 965 P.2d 1065 (Utah Ct. App. 1998); Dipoma v. McPhie, 2000 UT App 130, 1 P.3d 564, cert. granted, 9 P.3d 170 (Utah 2000).

COLLATERAL REFERENCES

Utah Law Review. — Case Law Development: I. Appellate Review and Procedure, 1998 Utah L. Rev. 585.

A.L.R. — Appealability of order suspending imposition or execution of sentence, 51 A.L.R.4th 939.

Rule 4. Appeal as of right: when taken.

(a) *Appeal from final judgment and order.* In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) *Motions post judgment or order.* If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time f[illegible]

of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court under Rule 24 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) *Filing prior to entry of judgment or order.* Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) *Additional or cross-appeal.* If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) *Extension of time to appeal.* The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) *Appeal by an inmate confined in an institution.* If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. If a notice of appeal is filed in the manner provided in this paragraph (f), the 14-day period provided in paragraph (d) runs from the date when the trial court receives the first notice of appeal.

(Amended effective November 1, 1998; April 1, 1999.)

Amendment Notes. — The 1998 amendment added Subdivision (f).

The 1999 amendment deleted provisions for motions under Rule 26 from the second sentence in Subdivision (b).

NOTES TO DECISIONS

Administrative actions.

Subdivision (c) does not apply to petitions for review of administrative actions. Maverik Country Stores, Inc. v. Industrial Comm'n, 860 P.2d 944 (Utah Ct. App. 1993).

The cross-appeal provisions of this rule do not apply to proceedings for judicial review of agency decisions. Viktron/Lika Utah v. Labor Comm'n, 2001 UT App 8, 412 Utah Adv. Rep. 43, — P.3d —.

Attorney fees.

No cross-appeal is necessary where plaintiffs merely sought attorney's fees incurred in defending their judgment on appeal. Wallis v. Thomas, 632 P.2d 39 (Utah 1981).

Attorney's failure to file notice.

Where if within the statutory period for

IN THE THIRD DISTRICT COURT

SALT LAKE COUNTY, DIVISION I, STATE OF UTAH

Myra Margis	.	SCHEDULING ORDER
	.	CASE NO. 940905177
VS	.	JUDGE LESLIE A LEWIS
Bert Lietz	.	

COUNSEL ARE HEREBY GIVEN NOTICE THAT A HEARING HAS BEEN SET ON THE ABOVE-ENTITLED CASE ON THE 30th DAY OF April, 1998 AT 10:30 AM WITH THE HONORABLE LESLIE A LEWIS. THE COURT HAS SCHEDULED 1/2 HOUR FOR THIS HEARING.

THE FOLLOWING MATTERS WILL BE ARGUED TO THE COURT:

1. Letter written by Myra Margis dated 11/3/97

UNAVAILABILITY OR NON-APPEARANCE OF COUNSEL WILL RESULT IN PLEADINGS BEING STRICKEN AND A DEFAULT ENTERED. COUNSEL ARE TO NOTIFY THE COURT IMMEDIATELY, IF THEIR CALENDAR DOES NOT PERMIT THIS HEARING.

DATED THIS 5th DAY OF JAN, 1998

Leslie A. Lewis

HONORABLE Leslie A Lewis

Case No: 940905177
Date: Jan 06, 1998

CERTIFICATE OF NOTICE

I certify that a copy of the enclosed notice was sent to the following people by the method and on the date specified.

DATE	METHOD	NAME
01/06/98	Mail	JEROLD D. MCPHIE VALLEY TOWER, 10TH FLOOR 50 WEST BROADWAY SALT LAKE CITY, UT 841010000
01/06/98	Mail	NATHAN D. PACE 47 west 200 so, suite 102 SALT LAKE CITY UT 841010000

M Snapp
Deputy Court Clerk

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court at 801-535-5009 at least three working days prior to the proceeding.

NOVEMBER 3, 1997
NATHAN PACE, ATTY.

Pull File today

MR. PACE, 9 9/09/05/77

I AM WRITING YOU & JUDGE LESLEY LEWIS THIS LETTER OF FACTS IN REQUEST FOR A FULL REFUND AS YOU DID NOT & STILL HAVE NOT FOLLOWED UP ON MY CASE WHICH I PAID FOR.

BERT LIETZ WAS ALLOWED TO DO JUST AS HE HAS BEFORE TO RUN LOOSE & TAKE FROM INNOCENT PEOPLE.

BERT HAD A DIRECT ORDER TO COMPLY FROM JUDGE LEWIS & DID NOT EVEN COME CLOSE TO HER REQUEST. SHE STATED H E M U S T D O BUT HE DID NOT & IS STILL LOOSE. YOU FORCED ME TO GO INTO HER CHAMBERS WITH AN UNTRUTH & LEFT AS A BIG JOKE & STILL IS. I WAS ORDERED BY JUDGE LEWIS TO DO THIS & ACCEPT IT , I BELIEVE SHE TOLD ME, THIS JOKE OF A SETTLEMENT & I NEVER EVEN GOT THAT. I HAD TO DRIVE TWICE TO SLC & TWICE BERT DID NOT COMPLY.

WHEN HE FINALLY DID SHOW UP HE COMES WITH A PICK UP TRUCK OF BINGO CLUB STUFF WHEN HE GOT AWAY WITH 2 30 FOOT RYDER TRUCKS FULL. BERT THREATENED ME , TRIED TO HIT YOU, TRIED TO HIT MY HUSBAND WITH HIS TRUCK WHICH HAD 2 DIFFERENT PLATES WHICH I CALLED BACK TO YOU & AGAIN YOU DID NOTHING. I DID NOT EVEN GET 1/3 OF MY STUFF BACK NOR THE PEOPLE'S THINGS, NOR MY MONEY.....BERT WAS ORDERED TO PAY BY JUDGE LEWIS, WHICH I WAS ENTITLED TO BY THE LAW THAT STATES THE JUDGES ORDERS ARE TO BE OBEYED.. W E L L!!!!!!!!!!!??????

BERT STALKED ME TIL I HAD TO LEAVE SLC & FINALLY THE STATE. YOU WERE AT MY HOME WHEN HE WAS TO SEND THE MUSCLE PEOPLE TO STEAL MY PERSONAL BELONGINGS RIGHT OUT OF MY HOME. YOU HEARD THE THREATENING TAPES, YOU CALLED THIS SO CALLED MARSHALL. BERT GOT AWAY WITH THAT ALSO AS YOU DID NOTHING TIL WE HAD TO SELL & MOVE. & HE IS STILL BRAGGING HOW HE MADE MYRA'S BIG FANCY ATTORNEY COWTIE TO HIM. I AM TRULY SORRY I EVER GOT INVOLVED WITH YOU AS YOU ARE WITH ME I'M SURE.

I HOPE MY REFUND ALONG WITH ALL MY TAPES OF THE CLUB & PAPERS I GAVE YOU WILL BE IN THE MAIL TO ME WITHIN THE WEEK. I WILL WAIT 1 WEEK, 5 WORKING DAYS, TO HEAR FROM YOU & JUDGE LEWIS CONCERNING THIS MATTER. THEN I WILL ASK FOR AN INQUIRY INTO JUDGE LEWIS, YOU & MCPHEE INTO THIS WHOLE JOKE OF A LEGAL SYSTEM ALONG WITH BERT.

I NEVER GOT MY DAY IN COURT NOR MY SAY, BUT BERT WAS ALLOWED TO SPEAK TO THE JUDGE & LOOK WHAT HAPPENED. THIS MAN IS DEFINITELY A THREAT TO SOCIETY & ME & SHOULD BE STOPPED. REMEMBER JUDGE LEWIS'S CLERK, BERT & HIS ATTORNEY GOT AWAY WITH CHANGING THE COURT DATE SO YOU & I WOULD NOT BE THERE & OF COURSE I GOT BLAMED FOR A NO SHOW & YOU DID NOTHING ABOUT

THAT EITHER. I FEEL I WAS TOTALLY DISCRIMINATED AGAINST & YOU ALLOWED ALL OF THIS TO CONTINUE FOR 4/5 YEARS & IT SHOULD OF BEEN SETTLED IN A MATTER OF MONTHS OR WEEKS. BUT OF COURSE YOU GOT MORE MONIES THAT WAY. WELL I HOPE YOU WILL DO THE RIGHT THING AS A PERSON IF NOT AS AN ATTORNEY.

MYRA MARGIS
PO BOX 605
MESQUITE, NV 89024-0605

CC; NATHAN PACE
JUDGE LESLEY LEWIS
MCPHEE, ATTORNEY
UTAH BAR ASSOCIATION

NOVEMBER 3, 1997
NATHAN PACE, ATTY.

MR. PACE,

I AM WRITING YOU & JUDGE LESLEY LEWIS THIS LETTER OF FACTS IN REQUEST FOR A FULL REFUND AS YOU DID NOT & STILL HAVE NOT FOLLOWED UP ON MY CASE WHICH I PAID FOR.

BERT LIETZ WAS ALLOWED TO DO JUST AS HE HAS BEFORE TO RUN LOOSE & TAKE FROM INNOCENT PEOPLE.

BERT HAD A DIRECT ORDER TO COMPLY FROM JUDGE LEWIS & DID NOT EVEN COME CLOSE TO HER REQUEST, SHE STATED H E M U S T D O BUT HE DID NOT & IS STILL LOOSE. YOU FORCED ME TO GO INTO HER CHAMBERS WITH AN UNTRUTH & LEFT AS A BIG JOKE & STILL IS. I WAS ORDERED BY JUDGE LEWIS TO DO THIS & ACCEPT IT , I BELIEVE SHE TOLD ME, THIS JOKE OF A SETTLEMENT & I NEVER EVEN GOT THAT. I HAD TO DRIVE TWICE TO SLC & TWICE BERT DID NOT COMPLY.

WHEN HE FINALLY DID SHOW UP HE COMES WITH A PICK UP TRUCK OF BINGO CLUB STUFF WHEN HE GOT AWAY WITH 2 30 FOOT RYDER TRUCKS FULL. BERT THREATENED ME , TRIED TO HIT YOU, TRIED TO HIT MY HUSBAND WITH HIS TRUCK WHICH HAD 2 DIFFERENT PLATES WHICH I CALLED BACK TO YOU & AGAIN YOU DID NOTHING. I DID NOT EVEN GET 1/3 OF MY STUFF BACK NOR THE PEOPLE'S THINGS, NOR MY MONEY.....BERT WAS ORDERED TO PAY BY JUDGE LEWIS, WHICH I WAS ENTITLED TO BY THE LAW THAT STATES THE JUDGES ORDERS ARE TO BE OBEYED.. W E L L!!!!!!!!!!!??????

BERT STALKED ME TIL I HAD TO LEAVE SLC & FINALLY THE STATE. YOU WERE AT MY HOME WHEN HE WAS TO SEND THE MUSCLE PEOPLE TO STEAL MY PERSONAL BELONGINGS RIGHT OUT OF MY HOME, YOU HEARD THE THREATENING TAPES, YOU CALLED THIS SO CALLED MARSHALL, BERT GOT AWAY WITH THAT ALSO AS YOU DID NOTHING TIL WE HAD TO SELL & MOVE. & HE IS STILL BRAGGING HOW HE MADE MYRA'S BIG FANCY ATTORNEY COWTIE TO HIM. I AM TRULY SORRY I EVER GOT INVOLVED WITH YOU AS YOU ARE WITH ME I'M SURE.

I HOPE MY REFUND ALONG WITH ALL MY TAPES OF THE CLUB & PAPERS I GAVE YOU WILL BE IN THE MAIL TO ME WITHIN THE WEEK. I WILL WAIT 1 WEEK, 5 WORKING DAYS, TO HEAR FROM YOU & JUDGE LEWIS CONCERNING THIS MATTER. THEN I WILL ASK FOR AN INQUIRY INTO JUDGE LEWIS, YOU & MCPHEE INTO THIS WHOLE JOKE OF A LEGAL SYSTEM ALONG WITH BERT.

I NEVER GOT MY DAY IN COURT NOR MY SAY, BUT BERT WAS ALLOWED TO SPEAK TO THE JUDGE & LOOK WHAT HAPPENED. THIS MAN IS DEFINITELY A THREAT TO SOCIETY & ME & SHOULD BE STOPPED. REMEMBER JUDGE LEWIS'S CLERK, BERT & HIS ATTORNEY GOT AWAY WITH CHANGING THE COURT DATE SO YOU & I WOULD NOT BE THERE & OF COURSE I GOT BLAMED FOR A NO SHOW & YOU DID NOTHING ABOUT

THAT EITHER. I FEEL I WAS TOTALLY DISCRIMINATED AGAINST & YOU ALLOWED ALL OF THIS TO CONTINUE FOR 4/5 YEARS & IT SHOULD OF BEEN SETTLED IN A MATTER OF MONTHS OR WEEKS. BUT OF COURSE YOU GOT MORE MONIES THAT WAY. WELL I HOPE YOU WILL DO THE RIGHT THING AS A PERSON IF NOT AS AN ATTORNEY.

MYRA MARGIS
PO BOX 605
MESQUITE, NV 89024-0605

IN THE THIRD DISTRICT COURT

SALT LAKE COUNTY, DIVISION I, STATE OF UTAH

Myra Margis	.	SCHEDULING ORDER
	.	CASE NO. 940905177
VS	.	JUDGE LESLIE A LEWIS
Bert Lietz	.	

COUNSEL ARE HEREBY GIVEN NOTICE THAT THE HEARING SCHEDULED ON 4/30/98 AT 10:30 IS HEREBY CONTINUED AND RESCHEDULED FOR 5/7/98 AT 10:00 AM WITH THE HONORABLE LESLIE A LEWIS. THE COURT HAS SCHEDULED 1/2 HOUR FOR THIS HEARING.

UNAVAILABILITY OR NON-APPEARANCE OF COUNSEL WILL RESULT IN PLEADINGS BEING STRICKEN AND A DEFAULT ENTERED. COUNSEL ARE TO NOTIFY THE COURT IMMEDIATELY, IF THEIR CALENDAR DOES NOT PERMIT THIS HEARING.

DATED THIS 7TH DAY OF JAN, 1998

Lisa A. Lewis

HONORABLE Leslie A Lewis

STATE OF UTAH

CERTIFICATE OF NOTICE

I certify that a copy of the enclosed notice was sent to the following people by the method and on the date specified.

DATE	METHOD	NAME
01/07/98	Mail	JEROLD D. MCPHIE VALLEY TOWER, 10TH FLOOR 50 WEST BROADWAY SALT LAKE CITY, UT 841010000
01/07/98	Mail	NATHAN D. PACE 47 west 200 so, suite 102 SALT LAKE CITY UT 841010000

M Snarr
Deputy Court Clerk

THIRD DISTRICT COURT - SLC COURT
SALT LAKE COUNTY, STATE OF UTAH

MYRA MARGIS, Plaintiff,	:	NOTICE OF PRETRIAL/SCHEDULING CONFERENCE
vs.	:	Case No: 940905177 CV
BERT LIETZ, Defendant.	:	Judge: LESLIE LEWIS Date: May 13,1998

PRETRIAL/SCHEDULING CONFERENCE is scheduled.
Date: 08/14/1998
Time: 04:00 p.m.
Location: Fourth Floor - N44
THIRD DISTRICT COURT
450 SOUTH STATE
SLC, UT 84111-1860

COUNSEL ARE TO HOLD MEANINGFUL SETTLEMENT DISCUSSIONS PRIOR TO THIS HEARING AND ARE TO BE PREPARED TO REPORT ON ISSUES RESOLVED AND ISSUES IN CONFLICT. IF THE CASE CANNOT BE SETTLED, A TRIAL DATE WILL BE SCHEDULED.

THE COURT MAY IMPOSE OTHER SANCTIONS, SUCH AS AWARD OF ATTORNEY'S FEES TO OPPOSING PARTIES, AS MAY SEEM JUST IN THE CASE.

BOTH COUNSEL AND PARTIES WITH AUTHORITY TO SETTLE THE LAWSUIT MUST BE PRESENT.

Dated this 13 day of May, 1998.

LESLIE LEWIS
District Court Judge

Case No: 940905177
Date: May 13, 1998

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 940905177 by the method and on the date specified.

METHOD	NAME
Mail	JEROLD D. MCPHIE 336 SOUTH 300 EAST SUITE 200 SALT LAKE CITY, UT 841112504
Mail	NATHAN D. PACE 136 SOUTH MAIN SUITE 404 SALT LAKE CITY UT 841010000

Dated this 21 day of May, 1998.

M Snarr
Deputy Court Clerk

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court at 801-238-7391 at least three working days prior to the proceeding.

NATHAN D. PACE, (6626)
136 SOUTH, MAIN STREET SUITE 404
SALT LAKE CITY, UTAH 84101
TELEPHONE: (801) 355-9700
Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

MYRA MARGIS,	:	MOTION FOR CONTEMPT
	:	AND TO STRIKE ANSWER
Plaintiff,	:	AND ENTER JUDGMENT
	:	
v.	:	Civil No. 940905177CV
	:	
BERT LIETZ,	:	
	:	
Defendant.	:	Judge: Leslie Lewis

COMES NOW Plaintiff, by and through her attorney Nathan D. Pace, and hereby moves the Court for an Order holding the Defendant in Contempt for failing to comply with the previously entered settlement stipulation before the Court, and if the Defendant fails to appear at the August 14, 1998 pretrial conference and otherwise comply with the Court order of holding meaningful settlement discussions prior to that Conference, that the Court should Strike defendant's answer and enter a default judgment on behalf of the plaintiff in this case.

Plaintiff requests this motion be heard and argued by parties before the Court at the Pretrial scheduled for August 14, 1998 at 4:00pm.

The Parties previously came before the Court and prior to trial entered into and agreed to a stipulated settlement which was placed on the record by the Court and approved by the Court. Among the terms and as part of that stipulation, the Defendant was required to deliver the sum of $900.00 to the plaintiff and make an accounting of the items taken from the Plaintiff. The parties met at an appointed time to deliver the items to the Plaintiff and the delivered items were inventoried by Counsel for Plaintiff. Defendant handed counsel for Plaintiff a check for $900.00 at that time. Counsel for Plaintiff requested that Defendant initial the inventory list when the delivery was completed, Defendant refused. When counsel again requested that he initial the inventory list, Defendant ripped the $900.00 check from counsel for Plaintiff's hand, and drove away in his truck, nearly running over Plaintiff.

Several times during the ensuing months, Counsel for Plaintiff and Counsel for Defendant would discuss this matter. Counsel for Defendant would state that he was having a hard time communicating with his client, but that he would get him to redeliver the check as previously agreed to. However the check has never been delivered. As such, since the Defendant has shown a complete unwillingness to comply with the previous and what was intended to be a final stipulation and order of the Court regarding this matter, the Plaintiff moves the Court to hold the Defendant in Contempt for failing to Comply.

Further, the Court has ordered the parties appear on August 14, 1998 at 4:00pm for a pretrial conference and to have held meaningful discussions as to settlement prior to that date. Counsel for Plaintiff believes that neither defendant nor Counsel for Defendant will attend nor will

they participate in discussions prior to the hearing. If Defendant's do not participate in good faith settlement discussions and if they do not attend the August 14, 1998 hearing, Plaintiff moves the Court to strike the Defendant's Answer in this matter and immediately enter a default judgment for the Plaintiff according to the terms contained in Plaintiff's complaint.

Plaintiff should not be continually punished for Defendant's unwillingness to abide by the previous Order of the Court.

Plaintiff further asks the Court to order Defendant to pay to Plaintiff an award of $2,500 in attorneys fees in this matter which represent 20 hours at $125.00 which has been a more than reasonable amount of fees charged in this matter to date by Counsel for Plaintiff.

DATED THIS 31 day of July, 1998.

Nathan D. Pace
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of July, 1998, I had a true and correct copy of the foregoing Motion sent by U.S. Mail, postage prepaid to the following:

Jerold D. Mcphee
336 South 300 East #200
Salt Lake City, Utah 84111

* * * * *

MARGIS, *

Plaintiff, * HEARING

vs. * Case No. 940903177

LIETZ, *

Defendant. *

* * * * *

BE IT REMEMBERED that on the 14th day of August, 1998 the Hearing in the above-entitled matter was held at the above-entitled Court. This Hearing was electronically recorded.

A P P E A R A N C E S

For the Plaintiff: NATHAN D. PACE
Attorney at Law
47 West 200 South #102
Salt Lake City, UT 84101

* * * *

P R O C E E D I N G S

THE COURT: Okay. This is Margis or Margis vs. Lietz.

MR. PACE: Yes.

THE COURT: Okay. And we appear to have some people here but not everybody here.

MR. PACE: We have Nathan Pace for Myra Margis. I don't have any idea. I will tell the Court this, that I have called Mr. McPhie's office a number of times, I've actually filed a document with the Court, I think the Court has a copy of that Notice of Intent to Attempt to Enter Settlement Negotiations. I mailed that to his office at the end of July listing every single day between then and now when I can be available, heard nothing.

THE COURT: Well, we got a letter in February saying he was on active duty and not scheduled to be back in Salt Lake until early July. I wonder if he's even received notice.

MR. PACE: He -- Well, his -- his law firm is still in business, they're there, they're answering the phone.

THE COURT: I know, but I don't know what arrangements he has with them for coverage. Let's do this, I'd like to see what we can do to resolve this,

and I can put dates in place now, but then if he can't live with them he's just going to ask us to reset them, and his client isn't here either.

Why don't we set this over, Mr. Pace, and we'll notify him personally and indicate in the notice that failure to appear can result in pleadings being stricken or other sanctions, and I'm happy, if you can prove he received notice, to later order fees.

MR. PACE: I understand that, and the position of -- and I have -- in each of the -- I think the Court has noticed this three different -- this year three different times.

THE COURT: Have we?

MR. PACE: I've -- I've called the Court on behalf of his office saying that I knew he was out of the country.

THE COURT: Uh huh.

MR. PACE: And that's why the Court kept bumping it, and in each one of those notes the Court said if you couldn't come then he needed to -- that his -- if he didn't come or if he didn't show up that the pleading would be stricken.

I do know that his secretary, whoever I was talking to in the office, said that they had -- I --

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they had received the notices from the Court and knew he wasn't going to be back. Right now I do know -- at least what they're telling me -- is that he's in Missouri.

But when it comes right down to it, what Mr. Lietz is doing is still grossly unfair to my client. We have --

THE COURT: Yes. It is. But, you know, in looking at our Notice of Pre-Trial Scheduling Conference we made a mistake.

MR. PACE: What's that?

THE COURT: It says on it the Court may impose other sanctions, it doesn't say what sanctions and it doesn't say under what circumstances we might impose sanctions. What it should say is failure to appear by either party or counsel can result in pleadings being stricken, and it doesn't exactly say that, at least on that document. Let me see if it does anywhere else.

MR. PACE: In the last one that we received on the 13th of May -- Well, you're right, that one does say the Court may impose other sanctions (inaudible).

THE COURT: All right. What I'm going to do is order attorneys fees. How much time have you put

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in getting ready for this and coming today and in getting back to your office?

MR. PACE: Would that include the two motions that I filed the end of July?

THE COURT: Yes.

MR. PACE: Okay. I would say four hours at $120.00 an hour, including --

THE COURT: You're awarded fees in that amount. Before we proceed with any kind of hearing beyond a scheduling conference, he's to pay that in full and provide proof of it. Ma'am, did you miss work today?

MS. MARGIS: No. I came from California again.

THE COURT: Did you fly in from California?

MS. MARGIS: No. We drove.

THE COURT: And what do you think your gas costs were? You're entitled to be reimbursed too.

MS. MARGIS: Just the gas alone? Well, probably --

THE COURT: Well, no, and wear and tear on the car. What do you think it cost you? Did your husband miss work?

MS. MARGIS: No. Probably $250.00.

THE COURT: You're awarded $250.00 in

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travel, and that is also to be paid before he gets any opportunity to present a position to this Court. I am appalled that he has chosen not to come.

We are going to try one more time, and on the notice it is going to say the following, it is going to say that the Plaintiff may appear by phone, she need not appear in this jurisdiction for the next hearing.

Mr. Pace, you can appear and your client can appear by phone. And what that means, ma'am, is Mr. Pace needs a phone number where we can reach you, and you don't have to come back to the State. You've come, you've tried. So the next time you don't need to appear, you just need to be available by phone, and if he comes we'll call you.

And if he does not come, and by he I mean the Defendant and/or Counsel, then a bench warrant will be issued on the Defendant and -- well, what I'm going to do is strike the pleadings as well too.

Michelle, in the notice it is to say exactly this, failure to appear by the Defendant or an Attorney for the Defendant, and it's an Attorney, and in parenthesis put Mr. McPhie or one of his partners will result, and will is to be underlined, not may, but will result in the Defendant's pleadings being

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stricken and judgment entered in favor of the Plaintiff. And let me ask you to prepare an order, Mr. Pace, detailing the fees. Yeah.

MR. PACE: Okay.

THE COURT: And, ma'am, I apologize. The reason I'm not doing it today is not because you're not entitled to it, because I'm afraid if I struck his pleadings today that they'd just appeal it, and because the notice was not as clear as it might have been, it would be set aside.

So what I'm trying to do is get you what you need and make sure it sticks. So you don't need to come back, we'll save you another trip, you'll be reimbursed for what you've expended getting here.

If you had meals on the way, you're entitled to be re-paid for those, so you think about that, and if you want to file an affidavit, Mr. Pace, augmenting the $250.00, which seems very modest to me, she's entitled to receive that as well.

MR. PACE: Let me ask her right now if I could for a second.

THE COURT: Okay. You bet.

MR. PACE: Your Honor, she -- she was contemplating -- the $250.00 was representing the cost of getting here. She thinks that it's more like

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a $500.00 round trip for her --
THE COURT: To get back?
MR. PACE: Well, the total round trip.
THE COURT: And she's thinking of gas and wear and tear on the vehicle?
MR. PACE: Gas and food and motel, she figured in the motel.
THE COURT: All right. I'm going to find that, unless there is an objection, $500.00 is ordered to be paid. I think that's appropriate. We've been, it seems to me, considerably fair to the other side and the point has come where I'm disinclined to bend over backwards to accommodate them any longer.
So I'll order that and let's hope we can get this resolved. Let me give you a new date right now, Mr. Pace, that you can live with, and Mr. McPhie will have to live with it. Michelle, when could we do it? We just need thirty minutes.
COURT CLERK: We could actually do it next Friday at 4:00 o'clock.
THE COURT: Well, that's pretty quick, and that's what we'll do, the 21st of August at 4:00 o'clock. And I'm going to ask this of you, Counsel, I'm going to ask that you prepare the notice and fax

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it to Mr. McPhie's office on Monday and also mail it to him.
MR. PACE: Okay.
THE COURT: That way there can be no question about it.
MR. PACE: Okay.
THE COURT: And if he isn't here and/or his client isn't here, either one of them chooses to absent themselves, it's a done deal without Ms. -- Margis is it?
MS. MARGIS: Margis.
THE COURT: Margis -- I apologize -- having to reappear.
MR. PACE: Thank you.
THE COURT: Anything else that we need to talk about today?
MS. MARGIS: I would like to say something if it's all right.
THE COURT: You may.
MS. MARGIS: On the stuff that he returned to us after that very frightening day that we spent with him at the storage unit, none of it worked.
THE COURT: Okay. Well, I don't want to get into that until he's here, but that would be something appropriate to handle in an affidavit,

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Counsel, in case he isn't here next Friday and you're going to be moving for judgment, all of those things can be clarified.
MR. PACE: And if we move for judgment the amount that we've plead in the pleadings is sufficient to cover that.
THE COURT: Did that take into account --
MR. PACE: It does.
THE COURT: -- the fact that none of the property was operable?
MR. PACE: It does, because we specifically plead for punitive damages on things that weren't (inaudible).
THE COURT: Okay.
MS. MARGIS: Yeah. He took all of this and returned this this.
THE COURT: Okay.
MS. MARGIS: But nothing worked.
THE COURT: And so basically the complaint asked for the full amount and that's what you'll get.
MR. PACE: Yes.
THE COURT: And your husband looks a little discouraged, go buy him a nice dinner.
MS. MARGIS: He's sick.
THE COURT: Oh, he's sick, I'm sorry to hear

Page 12

that, sir. Well, he still deserves a nice dinner. Take care of yourselves.
MR. MARGIS: I will.
THE COURT: Sorry we were not able to accomplish more. Yes.
MR. PACE: A question on your order. The -- The order -- The amount you just ordered has to be paid before a case can be presented?
THE COURT: Yes. It does not mean that he can't come in, it means that if he gets beyond the scheduling conference --
MR. PACE: Okay. That that would need to be --
THE COURT: Right. It would need to be paid before a hearing or a trial where they raise any defenses or issues.
MR. PACE: Okay.
THE COURT: Okay.
MR. PACE: Thank you, Your Honor.
THE COURT: Thank you.

CERTIFICATE

STATE OF UTAH *

* ss

County of Salt Lake *

I, MINDY L NELSON, do hereby certify that the foregoing pages, numbered 1 through 12, contain a true and accurate transcript of the electronically recorded proceedings held in connection with Margis vs Lietz held on August 14, 1998, and was transcribed by me to the best of my ability from the cassette tape furnished to me

Dated this 6th day of April, 2000

_____

Mindy L Nelson, Transcriber

I, RENEE L STACY, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public for the State of Utah, do hereby certify that the foregoing transcript prepared by Mindy L Nelson was transcribed under my supervision and direction

_____

Renee L Stacy, CSR, RPR

Commission expires

* * * * *

MARGIS, *

Plaintiff, * HEARING

vs. * Case No. 940905177

LIETZ, *

Defendant. *

* * * * *

BE IT REMEMBERED that on the 21st day of August, 1998 the Hearing in the above-entitled matter was held at the above-entitled Court. This Hearing was electronically recorded.

A P P E A R A N C E S

For the Plaintiff: NATHAN D. PACE
Attorney at Law
47 West 200 South #102
Salt Lake City, UT 84101

* * * *

P R O C E E D I N G S

THE COURT: Okay. And who is we?

MR. PACE: Myself. I represent Myra Margis. The Court excused her. She's in California.

THE COURT: Where is the other side?

MR. PACE: The other side isn't here. They weren't here last week and the Court issued an order that if they didn't show you would strike their answer and enter a default judgment.

THE COURT: I do remember that, Nathan. Let me note that this was set for 4:00 o'clock, we've given them the grace time of fifteen minutes, it's now 4:17. Your motion to have the pleading stricken and relief sought by your client granted is --

MR. PACE: For the record --

THE COURT: -- acceded to.

MR. PACE: For the record, the notice that I've submitted to the Court I faxed to them on Monday, as well as mailed, as well as we received the notice from the Court as to this hearing we faxed that as well to them.

THE COURT: You've bent over backwards. Thank you for taking the time to refresh my recollection. I do remember this, and I'm sorry it wasn't originally on my schedule. I did have good

clerks who pulled the file. And you're absolutely correct, that is what I said before.

The relief you sought is granted, the Court finds, based upon your representation, based upon my knowledge of the case, notice went out and was received, there has been no response either in writing or by virtue of an appearance today.

MR. PACE: The amount --

THE COURT: I have one person today apparently I made happy. What else, Mr. Pace?

MR. PACE: The amount of the default -- The amount of the judgment should be $67,200.00 as prayed for in the complaint, together with after recurring interest. It was filed on May of 1994 and we'd ask interest from that date forward.

THE COURT: Now, that I think is problematic. Certainly you're entitled to have judgment for $67,200.00 and you're entitled to the appropriate interest on that from date of judgment. What is your theory on pre-judgment interest?

MR. PACE: Just if the pleadings were stricken then -- Just a question as to whether the interest pre-judgment reverts back to the date of the filing or from the date of judgment.

THE COURT: That's a good question. I could

be wrong on this.

MR. PACE: I don't know.

THE COURT: And if you believe I am, you could give me legal authority, but that does not strike me as equitable, because there has been, at the very least, a good faith basis for the other side at least believing that this was not going to result in past interest being accrued.

So in my discretion judgment is entered for the full amount, interest will start to accrue from this day forward. I'm granting judgment today. I'll sign the pleadings on Monday if you submit them, and I'll date it today's date, because that's when I'm entering judgment. But I am declining to impose pre-judgment interest.

MR. PACE: Okay. In the -- Okay. Thank you, Your Honor.

THE COURT: Anything else?

MR. PACE: In the pleading we had -- In the pleading we had requested attorneys fees. I --

THE COURT: You're entitled to them.

MR. PACE: Okay.

THE COURT: Would you provide me with an affidavit delineating the time spent, addressing the issue of reasonableness and necessity, and attach any

billing records you've got that are supportive of the same, and I will award a reasonable fee.

MR. PACE: Thank you, Your Honor.

THE COURT: Thank you. Sorry I was a little grumpy. It's been a very long day.

MR. PACE: It sounds like it.

THE COURT: In recess for ten minutes.

CERTIFICATE

STATE OF UTAH *

* ss.

County of Salt Lake *

I, MINDY L. NELSON, do hereby certify that the foregoing pages, numbered 1 through 6, contain a true and accurate transcript of the electronically recorded proceedings held in connection with Margis vs. Lietz held on August 21, 1998 and was transcribed by me to the best of my ability from the cassette tape furnished to me.

Dated this 6th day of April, 2000.

_____

Mindy L. Nelson, Transcriber

I, RENEE L. STACY, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public for the State of Utah, do hereby certify that the foregoing transcript prepared by Mindy L. Nelson was transcribed under my supervision and direction.

_____

Renee L. Stacy, CSR, RPR

Commission expires:

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MYRA MARGIS,	:	COURT'S RULING
Plaintiff,	:	CASE NO. 940905177
vs.	:	
BERT LIETZ,	:	
Defendant.	:	

The Court has before it several Notices to Submit, filed pursuant to Rule 4-501 of the Utah Code of Judicial Administration, in connection with defendant's Motion to Strike Plaintiff's Pleading from 10 October 2000 through Present, defendant's Motion to Quash and Recall Garnishment and Motion to Enlarge Time and the plaintiff's Motion to Strike Order. The Court has carefully considered each of these Motions and has also thoroughly reviewed the file in this matter.

It appears that this matter came before the Court for a pre-trial conference on June 14, 1996. According to the Minutes for this conference, the parties indicated to the Court that they had reached a stipulation. The stipulation was read into the record and the trial date was stricken. Counsel for the plaintiff was instructed to prepare the Order dismissing the case based on the stipulation.

In response to a letter written to the Court by the plaintiff, dated November 3, 1997, the Court scheduled a hearing for April 30, 1998. For unclear reasons, it does not appear that this hearing was ever held. Instead, because an Order of dismissal was never prepared, the Court scheduled a pretrial/scheduling conference for August 14, 1998. The Minutes for the August 14, 1998, hearing, indicate that the defendant and his counsel, Mr. McPhie, failed to appear. The Court granted the plaintiff attorney's fees and travel costs, totaling $980. The hearing was then re-scheduled for August 21, 1998, with a warning from the Court that if Mr. McPhie or one of his associates failed to appear again, the defendant's pleading would be stricken and judgment entered against him.

On August 21, 1998, Mr. McPhie again failed to appear and the Court granted the plaintiff's request to strike the defendant's Answer and enter judgment in her favor. The judgment amount granted was $67,200, together with interest to accrue from the date of the hearing. Attorney's fees were also granted. The Order and Judgment was entered on August 28, 1998.

On September 2, 1998, the defendant filed a Motion to Set Aside Judgment and Attorney's Fees. The basis for this Motion was that Mr. McPhie had been on military duty during the time that the two hearings were scheduled and was unable to attend. From the

point that the defendant filed this Motion to Set Aside, the record becomes more confusing because the file contains motions filed on behalf of the defendant by Mr. McPhie, by a Mr. Ziter (who entered an appearance of counsel on September 28, 1999) and by the defendant himself on a *pro se* basis. It appears that Mr. Ziter eventually withdrew as defendant's counsel and was replaced by the defendant's original attorney, Mr. McPhie. However, throughout the time of his representation by both counsel, the defendant was also submitting his own motions and pleadings, including a Motion to Dismiss and the Order of Dismissal, discussed below.

On December 18, 2000, the Court considered the defendant's Motion to Set Aside Judgment and denied it. An Order denying the Motion was entered contemporaneously.

On February 6, 2001, the defendant filed a second Motion and Memorandum to Set Aside Order and Rule on Outstanding Motions. This Motion essentially asks the Court to clarify the record by ruling on the defendant's Motion to Strike (the plaintiff's response to the original Motion to Set Aside as untimely), Motion to Release Funds and defendant's Objection to the plaintiff's proposed Order. It should have been clear to the defendant when the Court entered the plaintiff's proposed Order on December 18, 2000, that the defendant's Motion to Strike, Motion to Release and Objection were also being denied. However, to clarify the record,

the Court now rules that although it was not expressly stated, the Motion to Strike, Motion to Release and Objection were indeed denied upon the Court's entry of the December 18, 2000, Order.

On March 12, 2001, the Court received an Order of Dismissal that was filed by the defendant on a *pro se* basis. The Court entered this Order on March 14, 2001, because at first glance it appeared to reflect the reality that the parties reached an accord and satisfaction during the June 14, 1996, hearing before the Court. However, since the plaintiff filed her Motion to Strike Order, the Court has had an opportunity to further reflect on the propriety of this Order and whether it indeed conflicts with the events that transpired after the June 14, 1996, hearing and with the existing Judgment and Order already entered by the Court on August 28, 1998. The Court now determines that the Order of Dismissal does conflict with the prior Judgment and Order. In addition, it is not clear to the Court that the parties ever reached an accord and satisfaction because a formal Order dismissing the case based on the June 14, 1996, stipulation was never prepared and entered. Accordingly, the Court grants the plaintiff's Motion to Strike and vacates the Order of Dismissal entered on March 14, 2001. Furthermore, the defendant's Motion to

Quash and Recall Writ of Garnishment, which is based on the now-vacated Order of Dismissal, is also denied.[1]

Finally, the Court considers the defendant's Motion to Strike Plaintiff's Pleadings from 10 October 2000. While the plaintiff has apparently mailed certain of her pleadings to an incorrect address for the defendant, striking the plaintiff's pleadings is too harsh a remedy, particularly where it does not appear that the defendant has been prejudiced by this mistake. Plaintiff is to ensure that she corrects her mailing address for the defendant for all future filings. The defendant's Motion to Strike is denied.

In future if the defendant is represented by counsel, any motions should be filed by counsel.

This Court's Ruling will stand as the Order of the Court.

Dated this 22nd day of August, 2001.

LESLIE A. LEWIS
DISTRICT COURT JUDGE

[1] To clarify the record, in light of the Court's decision to vacate the Order of Dismissal, the defendant's Motion to Quash and related Motion to Enlarge Time are moot. However, in the interest of justice, the Court granted the Motion to Enlarge and considered the defendant's late-filed Reply to the plaintiff's Response to the Defendant's Motion to Quash.

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Court's Ruling, to the following, this 22 day of August, 2001:

Nathan D. Pace
David S. Pace
Attorneys for Plaintiff
136 S. Main, Suite 404
Salt Lake City, Utah 84101

Jerold D. McPhee
Attorney for Defendant
320 South 300 East, Suite 200
Salt Lake City, Utah 84111-2537

_____

COPY

DAVID PACE (8252)
NATHAN D. PACE, P.C. (6626)
136 SOUTH MAIN STREET, SUITE 404
SALT LAKE CITY, UTAH 84101
TELEPHONE: (801) 355-9700
Attorneys for Plaintiff.

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY OF THE STATE OF UTAH

MYRA MARGIS, Plaintiff, v. BERT LIETZ, Defendant.	MOTION TO STRIKE ORDER Civil No. 940905177 CV Judge: Lewis

COMES NOW THE PLAINTIFF, by and through Counsel, and hereby moves the court that the Order of Dismissal signed by the Court on March 14, 2001, be stricken from the record or corrected. Pursuant to URCP R. 60 (a), Plaintiff believes that this Order of Dismissal was signed as a clerical mistake, or that it requires clarification to reflect the Court's intent. In the alternative, Plaintiff believes that the Order of Dismissal should be set aside pursuant to URCP R. 60(4) or (6), as being void or (for clarification) as any other reason justifying relief. This motion is brought within a reasonable time. The attached Memorandum of Points is provided in support.

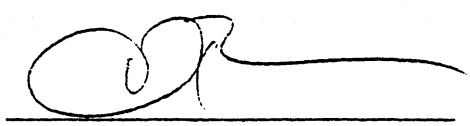
DATED this July 15, 2001.

By: _____
David S. Pace
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that I caused to be delivered a true and correct copy of foregoing **MOTION TO STRIKE ORDER** to the following by U.S. Mail, postage prepaid, on July 15, 2001, at:

Jerold D. McPhee
336 South 300 East, Suite 200
Salt Lake City, UT 84111-2504
ph. (801) 322-1616



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Attorneys for Plaintiff.

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY OF THE STATE OF UTAH

MYRA MARGIS, Plaintiff, v. BERT LIETZ, Defendant.	MEMORANDUM IN SUPPORT OF MOTION TO STRIKE ORDER Civil No. 940905177 CV Judge: Lewis

COMES NOW THE PLAINTIFF, by and through Counsel, and hereby submits this Memorandum of Points and Authorities in support of her Motion to Strike Order, concerning an Order of Dismissal signed by the Court on March 14, 2001

FACTS REGARDING THE ORDER OF DISMISSAL

1. The Order of Dismissal was never the subject of any Motion to Submit ever filed with the Court.

2. Defendant submitted the Order to the Court pro se although he has continually been represented by counsel, and was represented by Counsel at the time.

3. The Order was signed by the Court on March 14, 2001, and the accompanying certificate of service was filed on March 12, 2001. (attached)

4. The time differential of the filing and signing of this order indicates that regardless of notice, Plaintiff was given no opportunity to review or object to the contents of the Order.

5. No Rule 4-504 notice is attached to the Order or reflected in any Court Filing.

6. Plaintiff or Counsel never received any copy of a proposed order despite the mailing certificate.

7. Plaintiff's Counsel did not receive any actual notice that this Order had been submitted to or signed by the Court until delivered by Defendant's attorney as part of a Motion to Quash Garnishment, (attached) which was received on July 9, 2001.

8. The Third District Court Clerk still lists a judgment being in effect for this case, entered on August 28, 1998, in the amount of $70,180.00.

FACTS REGARDING CASE HISTORY

9. The Order of Dismissal signed March 14, 2001, addresses a settlement agreement heard by the court on June 14, 1996.

10. The Defendant's noncompliance with the settlement agreement of June 14, 1996. was the subject matter of the hearings to be addressed by the Court on August 14, 1998, and August 21, 1998, as requested by Plaintiff's Motion for Contempt and to Strike Answer and Enter Judgment, which was filed on July 31, 1998. (attached)

11. The hearings on August 14, 1998, and August 21, 1998, were attended by neither the Defendant nor Counsel for Defendant.

12. Defendant's Answer was stricken and Judgment was entered against him on August 28, 1998, as sanctions for non-appearance at the hearings of August 14, 1998, and August 21, 1998.

13. On September 2, 1998, Defendant, through his attorney, filed a Motion to set aside the judgment, which the Court had previously ruled would not be heard until Defendant tendered $980.00 in costs and attorney fees to the Court.

14. On October 8, 1998, the Plaintiff filed a response to Defendant's motion to set aside the judgment.

15. On October 15, 1998, Defendant, through his attorney, filed a motion to strike Plaintiff's response to Defendant's motion to set aside.

16. Defendant tendered court-ordered sanctions of $980.00 to the Court on October 5, 2001, which the Court had ordered to be a prerequisite to any further rulings on the case.

17. On October 6, 2001, Defendant, through his attorney, filed a notice to submit on his motion to set aside the judgment and his motion to strike Plaintiff's response.

18. On November 15, 2001, based on Defendant's Notice to Submit, the Court denied Defendant's Motion to set aside the judgment, and ordered that the Judgment would remain in effect. (attached)

19. On November 24, 2000, Defendant, through his attorney, submitted a Proposed Order reflecting the Court's denial of Defendant's motion to set aside judgment, and the Plaintiff filed an objection to the Defendant's proposed Order on December 4, 2000.

20. On December 4, 2000, Plaintiff submitted a proposed Order reflecting the Court's denial of Defendant's Motion to set aside Judgment, and the Defendant, through counsel, filed an objection to Plaintiff's proposed order on December 11, 2000.

21. On December 19, 2000, the Court apparently reviewed both Proposed Orders and both sets of Objections, and the Court signed the Plaintiff's proposed Order reflecting the Court's Denial of Defendant's Motion to Set Aside the Judgment.

22. In addition, on December 4, 2000, Plaintiff filed a motion to release funds held by the Court, to which Defendant, through counsel, filed an objection on December 11, 2000.

23. On December 18, 2000, the court executed the Plaintiff's proposed Order Releasing Funds.

24. On February 2, 2001, Defendant, through Counsel, filed a notice to submit for decision on Defendant's Motion to Strike Plaintiff's Response, Defendant's Proposed Order regarding the Defendant's Motion to set aside judgment, Plaintiff's Objection to same, Plaintiff's Motion for Release of Funds, Defendant's Opposition to same, and Defendant's Objection to Plaintiff's Proposed Order regarding Defendant's Motion to set aside Judgment. (attached)

25. None of these motions or orders had any relation to the Order to Dismiss filed with the court by the Defendant, pro se, on March 12, 2001, and signed on March 14, 2001.

26. The Third District Court Clerk's log indicates that the Notice to Submit of February 2, 2001, was delivered to the Court for Decision on March 12, 2001.

27. While several of the orders and motions referenced in Plaintiff's Notice to Submit of February 2, 2001, appear to have previously been decided by the Court, the Order of Dismissal signed on March 14, 2001, does not address any of the issues contained in the motions and orders contained in the notice to submit.

28. A valid Writ of Garnishment to First Security Bank was issued by the Court on 10 April 2001 and served on 12 April 2001, without objection by Defendant.

29. A valid Writ of Garnishment to America First Credit Union was issued by the Court on 26 June 2001 and served on 28 June 2001.

30. Defendant, by counsel, filed a Motion to Quash and Recall Writ of Garnishment on 5 July 2001, based on the Order of Dismissal signed March 14, 2001, effective June 14, 1996.

31. Plaintiff's Counsel first received actual notice or knowledge of Defendant's Order of Dismissal signed March 14, 2001, effective June 14, 1996, as an addendum to Defendant's Motion to Quash Garnishment, which was received on July 9, 2001.

ARGUMENT

THE ORDER OF MARCH 14, 2001, APPEARS TO BE SIGNED AS A CLERICAL ERROR BY THE COURT, AND SHOULD BE STRICKEN PURSUANT TO URCP 60(a)

Even though a valid Judgment remains in place against Defendant, Plaintiff believes that the Order of Dismissal was signed as a mistake or clerical error by the Court. On February 2, 2001, Defendant's Counsel submitted a Notice to Submit encompassing seven different procedural motions, objections, and orders. Court records indicate that on March 12, 2001, the Notice to Submit was delivered to Judge Lewis for ruling, on the same day that Defendant pro se filed a totally separate Order of Dismissal with the Court. Plaintiff's counsel never received a copy of this order or was given any opportunity to respond to the order. On March 14, 2001, at most two days after being filed, that Order of Dismissal was signed by the Court, although it was never the subject of any Notice to Submit or other Motion before the court.

URCP 60(a) allows that clerical mistakes in "orders or other parts of the record and errors therein arising from oversight . . .may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." As a clerical error or mistake, the signed Order of Dismissal should be stricken by the Court immediately. The

Court should require that Defendant present his Order of Dismissal by regular motion, with an opportunity for response by Plaintiff, before being considered for signature by the Court.

THE SUBSTANCE OF DEFENDANT'S ORDER OF DISMISSAL WAS SET ASIDE BY THE COURT WHEN JUDGMENT WAS ENTERED AGAINST DEFENDANT ON AUGUST 28, 1998, FOR NON-APPEARANCE AND NON-COMPLIANCE WITH THE PREVIOUS SETTLEMENT AGREEMENT. AN ACCORD WAS RECOGNIZED BY THE COURT, BUT NOT SATISFACTION. PURSUANT TO URCP 60(a), THE COURT SHOULD STRIKE OR CORRECT THE ORDER TO PREVENT THE APPEARANCE OF A MISTAKE IN THE RECORD

URCP 60(a) provides that clerical errors in orders may be corrected at any time. A Clerical amendment to an order "is one which is intended to make the judgment speak the truth by showing what the judicial action really was. . ." Richards v. Siddoway, 24 Utah 2d 314, 471 P.2d 143 (Utah 1970). A clerical error is not a "judicial errors"; A clerical amendment cannot correct a judicial decision by "making [a judgment] express something which the court did not pronounce, and did not intend to pronounce, in the first instance." Richards. Plaintiff submits that the Defendant's Order of Dismissal does not accurately reflect the actual rulings of the Court, and as such should be stricken or corrected.

The Defendant's Order of Dismissal decrees that "the parties did reach an accord and satisfaction in this matter." The record of the hearing on June 14, 1996, indicates that while the Court recognized that an agreement for settlement was reached (an accord), satisfaction of that agreement was never provided. The extensive proceedings following that hearing, and the Court's eventual entering of Judgment against the Defendant on August 28, 1998, are the result of the Court's actual determination that the Defendant had not complied with or provided satisfaction to that settlement agreement and subsequent court orders.

Quickly addressing the content of Defendant's Order of Dismissal, the Order is based on a settlement agreement made in Court on June 14, 1996. Defendant's noncompliance with the settlement agreement was the subject of Plaintiff's Motion for Contempt filed July 31, 1998. In the Motion, Plaintiff submitted to the Court that Defendant ripped the settlement check from Plaintiff's attorney's hand and drove away, nearly running knocking down Plaintiff's attorney Nathan Pace with his truck. For the next two years Defendant refused to redeliver the check or participate in attempts to comply with the settlement agreement. The Motion for Contempt was scheduled for hearing on August 14, 1998, and August 21, 1998. Defendant's nonappearance at the Court hearings of August 14, 1998, and August 21, 1998, was the basis for Judgment being entered against him. Judgment was entered against Defendant on August 28, 1998, as sanctions for non-compliance with the settlement agreement addressed in Defendant's Order of Dismissal.

Defendant's Order of Dismissal states that an accord and satisfaction was completed on June 14, 1996. While an initial settlement agreement was reached in court, Satisfaction was never delivered. Defendant did not comply with the settlement agreement or with further court orders. As sanctions for Defendant's non-compliance, Defendant's Answer was stricken and judgment was entered against him. As sanctions for Defendant's non-compliance, the settlement agreement and the potential dismissal of the case was voided. While an order could be entered reflecting the court hearing of June14, 1996, the Order of Dismissal does not clearly reflect the status of this case. The Order should reflect that notwithstanding the settlement agreement, Judgment was entered against Plaintiff on August 28, 1998. To correct the appearance of an oversight in the record, the Court should strike the Defendant's Order of Dismissal or correct it to reflect that Judgment was subsequently entered against Defendant. URCP 60(a) again provides that the Court may make this correction at any time of its own initiative.

DEFENDANT'S ORDER OF DISMISSAL OF MARCH 14, 2001, SHOULD BE STRICKEN AS BEING VOID PURSUANT TO URCP 60(b)(4)

The Order of Dismissal signed on March 14, 2001, indicates that this case was dismissed effective 14 June 1996. Notwithstanding a settlement agreement being reached on that date, the Defendant's answer was subsequently stricken by the Court and Judgment was entered against

him on August 28, 1998. As such the dismissal referred to in Defendant's Order of Dismissal is void and should be stricken from the record by the Court.

DEFENDANT'S ORDER OF DISMISSAL OF MARCH 14, 2001, SHOULD BE STRICKEN OR AMENDED IN ORDER TO CLARIFY THE STATUS OF THE COURT'S ORDERS, AS "ANY OTHER REASON" PURSUANT TO URCP 60(b)(6)

This Court entered Judgment against the Defendant on August 28, 1998, even though the parties had previously reached a settlement agreement. While the Third District Court Clerk's record still accurately reflects that a valid judgment has been entered against the Defendant, the presence of an Order of Dismissal in the record effective two years prior to the Entry of Judgment creates the possibility of confusion regarding the Court's orders. The Defendant has filed a motion to quash a valid garnishment based on this Order of Dismissal. In the event that the Court does not seek to clarify this as a clerical matter under URCP 60(a), the Court should clarify the order under the authority of URCP 60(b)(6).

"A Motion for 'Clarification of Judgment' is not specifically provided for in the Utah Rules of Civil Procedure. However, the substance of the motion is to make clear a judgment that it is not already clear. If the clarity of the judgment is called into question because the opposing party is improperly applying the judgment, then implicit in the motion is a request to change the

judgment to provide relief to a party harmed by the lack of clarity. Accordingly, we hold that in the case before us, appellees motion for clarification, in which appellants joined, was sufficient to invoke Rule 60(b)." Kunzler v. O'dell, 215 Utah Adv. Rep. 57, 855 P.2d 270 (Ct. App. 1993).

"A court may grant relief under subsection seven [six] of Rule 60(b) for any reason other than the first six [five] enumerated by the rule if relief is justified, and the motion is made within a reasonable time." Utah R. Civ. P. 60(b); Richins v. Delbert Chipman & Sons Co., Inc., 817 P.2d 382, 387 (Utah App. 1991). Kunzler v. O'dell. Plaintiff does not claim "(1) Mistake, inadvertence, surprise, or excusable neglect;" as the basis of this 60(b) motion because the Judgment entered against Defendant on August 28, 1998, has correctly not been affected by the Order of Dismissal. Two valid garnishments have been issued by the Court subsequent to the Defendant's Order of Dismissal, one on April 10, 2001, and one on June 26, 2001. This motion is also not based on "(3) fraud." This 60(b)(6) motion is for the purpose of clarifying the Court's Record concerning this Order of Dismissal, so that it remains clear to Court personnel or other judges evaluating the validity of writs of garnishment that a valid Judgment has been entered and affirmed by this court (on November 15, 2001), despite the entry of dismissal at a prior date.

For greatest clarity of the record the Order of Dismissal should be stricken, with a new Order prepared which clearly describes the record of this Case. The Court should require that Defendant present his Order of Dismissal by regular motion, with an opportunity for response by Plaintiff, before being considered for signature by the Court. In the alternative the Court should

correct the Order to reflect that despite the previous settlement agreement a Judgment was subsequently entered against Defendant.

TIMELINESS

Relief under URCP 60 (a) may be sought "at any time." Relief under URCP 60 (4) or (6) must be sought within "a reasonable time." The Court has issued two valid garnishments since the entry of the Order of Dismissal. Defendant has created an apparent need for clarification of the Order of Dismissal only in the last ten days by filing a Motion to Quash the latest Writ of Garnishment. This motion is filed four months after the Order was signed, and less than one week after Plaintiff first received actual notice of the Order of Dismissal. No party has been prejudiced to this point in the passage of time from the signing of the Order of Dismissal. This motion is timely.

WHEREFORE, PLAINTIFF REQUESTS THE FOLLOWING RELIEF:

1. That pursuant to URCP 60(a), as a clerical error or mistake, the Order of Dismissal signed March 14, 2001, effective June 14, 1996, should be stricken by the Court immediately. The Court should require that Defendant present his Order of Dismissal by regular motion, with an opportunity for response by Plaintiff, before being entered by the Court.
2. That pursuant to URCP 60(a), to correct the appearance of an oversight in the record, the Court should strike the Defendant's Order of Dismissal signed March 14, 2001, effective

June 14, 1996, or correct it to reflect that Judgment was subsequently entered against Defendant.

3. That pursuant to URCP 60(b)(4), the dismissal referred to in Defendant's Order of Dismissal is void and should be stricken from the record by the Court.

4. That pursuant to URCP 60(b)(6), to clarify the Judgment entered in this case and avoid the appearance of an oversight in the record, the Court should strike the Defendant's Order of Dismissal signed March 14, 2001, effective June 14, 1996, or correct it to reflect that Judgment was subsequently entered against Defendant.

DATED this July 15, 2001.

By: _____
David S. Pace
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that I caused to be delivered a true and correct copy of foregoing **MEMORANDUM IN SUPPORT OF MOTION TO STRIKE ORDER** to the following by U.S. Mail, postage prepaid, on July 15, 2001, at:

Jerold D. McPhee
336 South 300 East, Suite 200
Salt Lake City, UT 84111-2504
ph. (801) 322-1616

_____

BERT LIETZ
4901 SOUTH LAURA DRIVE
MURRAY, UTAH 84107

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH.

MYRA MARGIS,

PLAINTIFF,

V.

BERT LIETZ,

DEFENDANT.

940905177
CASE NUMBER: ~~990909963CN~~

JUDGE LESLIE A. LEWIS

CERTIFICATE OF SERVICE BY PERSONAL SERVICE
[ORDER OF DISMISSAL (16 JUNE 1996)]

I certify that on this 12 day of March 2001, I personally placed a true and correct copy of the "Order of Dismissal referencing the court decision on 16 June 1996," in a sealed envelope. I further certify that the same was placed in the United States Postal System, postage prepaid and addressed to the following:

Natha Pace
136 South Main Street, Suite 404
Salt Lake City, Utah 84101

Signature

BERT LIETZ
4901 SOUTH LAURA DRIVE
MURRAY, UTAH 84107
(801) 268-1436

IN THE THIRD JUDICIAL DISTRICT COURT,

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH.

MYRA MARGIS,	}
PLAINTIFF,	} CASE NUMBER: 940905177CV
V.	}
BERT LIETZ,	} JUDGE LESLIE A. LEWIS
DEFENDANT.	}

ORDER OF DISMISSAL

This matter came before the court on 14 June 1996; her counsel, Nathan Pace represented the plaintiff, while his attorney, Jerold McPhee, represented the defendant. The parties reached an accord and satisfaction relating to this matter and agreed to this action being dismissed. The following facts are provided for the court:

On 14 June 1996 the parties reached an accord and satisfaction, as follows:

> "Mr. Lietz will return to Myra Margis all bingo equipment taken from the Carousel Club, as well as any other personal property of any - - either Mrs. Margis or any of the people who were there, the patrons of the carousel. Mr. Lietz will make no claim on the automobiles that secure Mr. Margis' debt to him. Both parties sign the mutual release of all claims against the either party and there will be the mutual restraining order in effect between the parties."

The court questioned the parties relating to the above accord and satisfaction. both parties acknowledged their acceptance. The court then accepted the accord and satisfaction and order Mr. Pace to prepare the paperwork for dismissal. A copy of the transcript is incorporated and marked Exhibit "A." Also provided is a copy of the money order. which is incorporated and marked as Exhibit "B." A statement relating to the return of the property was previously filed with the court.

Therefore. the defendant has complied with the accord and has satisfied the matter and the matter was thusly dismissed.

Plaintiff's attorney was ordered during this hearing to prepare and submit the necessary paperwork to dismiss this action. he failed to. This was a willful and deliberate violation on Mr. Pace's part. because the court clearly ordered him to do it and the rules of judicial Administration. Rule 4-504 requires it. His failure is a clear contempt of the court s order and will be made an issue separately on an order to show cause. The following is the courts own words:

> I will allow you. then. Mr. Pace. to prepare the documents concerning dismissal.

Mr. Pace the acknowledge the courts order by stating, "That's fine."

The defendant has taken it upon himself to prepare the paperwork and is submitting it for signature.

Therefore, the court after reviewing the defendant's dismissal and a full review of transcript and other documents provided, and the court record and upon good cause appearing the court orders the following:

It is hereby adjudged, decreed, and ordered that:

1. The parties did reach an accord and satisfaction in this matter. Furthermore, the court, in open court and on the record, accepted the accord and satisfaction as represented and accepted by both parties.

2. Once the court accepted the settlement agreement the court ordered the case to be dismissed and order the plaintiff's attorney to prepare the documents for its dismissal. Clearly from the record the plaintiff's attorney failed to comply with this courts order.

3. The effective date of dismissal is 14 June 1996.

Therefore, this action is dismissed with prejudice effective 14 June 1996.

Dated this 14th day of March 2001.

BY ORDER OF THE COURT:

Third Judicial District Court Judge
Leslie A. Lewis

Exhibit "A"

IN THE THIRD JUDICIAL DISTRICT COURT

COPY

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MYRA MARGIS Plaintiff, VS. BERT LIETZ Defendant.	CASE NO. 940905177CV

BEFORE THE HONORABLE LESLIE A. LEWIS, JUDGE

SALT LAKE CITY, UTAH

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JUNE 14 1996

REPORTED BY: Kathleen Schultz, CSR

A P P E A R A N C E S

FOR THE PLAINTIFF:

NATHAN D. PACE
PACE, BROADHEAD & NICKLE
ATTORNEYS AT LAW
47 West 200 South, No. 102
Salt Lake City, UT 84101

FOR THE DEFENDANT:

JEROLD D. MCPHEE
ATTORNEY AT LAW
431 South 300 East
Salt Lake City, UT 84111

Salt Lake City, Utah; June 14, 1996; P.M.

P R O C E E D I N G S

THE COURT: We're on the record in the matter of Myra Margis -- did I mispronounce it?

MR. PACE: No.

THE COURT: -- versus Bert Lietz. I'll indicate it's case number 940905177.

Mr. Pace is here with the plaintiff, the defendant is also present with counsel Mr. McPhee, and this matter was set for pre-trial. Counsel has visited respectively with the Court and their client and it's my understanding --

And I will ask you to reflect this for the record, as plaintiff's counsel, Mr. Pace, that there has been a resolution. Is that correct?

MR. PACE: That is correct.

THE COURT: Will you state, for the record, what your understanding of the resolution is.

MR. PACE: Mr. Lietz will return to Myra Margis all the bingo equipment taken from the Carousel Club, as well as any other personal property of any -- either Mrs. Margis or any of the people who were there, the patrons of the Carousel. Mr. Lietz will pay to Mrs. Margis the sum of $750. Mr. Lietz will make no claim on the automobiles that secure

Mrs. Margis' debt to him. Both parties will sign the mutual release of all claims against either party, and there will be the mutual restraining order in effect between the parties. Both parties shall have no contact, harassings, or any contact with the other party except through their legal counsel. And I believe that's it.

MR. MCPHEE: In addition -- one additional and one correction.

With respect to personal property that Mr. Lietz has or may have in his possession, if Mr. Lietz has personal property in his possession he will return that or make it available, any of the personal property he has, other than the bingo equipment, bingo machines, flash boards, microphones, and miscellaneous supplies.

Moreover, your Honor, payment and delivery -- rather, delivery of the equipment at a time convenient to plaintiff, and certainly within 14 days, and payment of the $750 within like period of time.

THE COURT: Mr. Pace, your client appears to have a concern. Is there anything else that needs to be clarified?

MR. PACE: Yeah. There were a number of

patrons of the Carousel Club that left a personal amount of personal belonging there, and those belongings were gone when Mr. Lietz got in back with the equipment.

THE COURT: What sorts of items are we talking about?

THE PLAINTIFF: People leave personal items on the table. There was stuff for sale on consignment that belongs to other people. I'm asking for something -- jackets, bingo bags full of bumpers and trinkets that they use for the bingo game, and also the kitchen equipment and --

THE COURT: All right. So, to the extent that those items exist, they are to be returned within the 14-day period of time. To the extent that they are not provided, I think the plaintiff is clearly entitled to an explanation, through counsel, of what occurred to those items. And I don't know that we can do better than that. If they're in existence and in the defendant's possession they are to be restored.

You're going to have your hands full, Mr. Lietz, not from Mrs. Margis, but from the other individuals, if they're not returned. These items being -- don't, please don't point.

What I would ask is that you give some thought to this matter and, as Mr. McPhee pointed out, you have a restoration period of 14 days, and what is required is you are to turn over everything that is encompassed in the agreement.

All right. Does that satisfy your client's concerns, Mr. Pace?

MR. PACE: I believe so.

MR. MCPHEE: Your Honor, if I may indicate, Mr. Lietz handed me a receipt, indemnity agreement executed by a Millie Hunt, stating that she had asserted a claim and is taking possession of two cupcake pans, two big pots, and one cookie sheet that would be -- I assume that is one of the individuals who assert a claim against personal items that Mr. Lietz may have had.

THE COURT: To the extent that items have been restored, obviously, Mrs. Margis is not going to contend that they haven't been restored. I understand that she's attempting to make sure people who have claims to property that would have been on the premises, have that restored to them. Obviously, if somebody has gotten back their items, then, that's something that she is not going to pursue, or the others are not going to pursue.

Now, Mrs. Margis, is this your understanding of the agreement? Do you agree to be bound by it? And I am referring to everything Mr. Pace has said with the modification suggested by Mr. McPhee.

THE PLAINTIFF: I'm not getting back the stuff he took, I guess, but --

THE COURT: I have no way of knowing that, but you have excellent representation and what you need to do is decide whether or not you want to go to trial on this and pay attorney's fees, and see what happens at the end of the trial, or whether you want to accept it. No one is forcing you to accept it. It's up to you, but if you accept it you will be bound by it. And I suspect that if you don't accept it, this $750 and restoration of property will not be on the table the next time. So that's up to you. Do you need time to think about it? Or is this your agreement and do you agree to be bound by it?

THE PLAINTIFF: I guess I'm willing to try.

THE COURT: Is this your agreement?

THE PLAINTIFF: Yes.

THE COURT: And do you agree to be bound by it?

THE PLAINTIFF: Yes.

THE COURT: Mr. Lietz, is this your agreement and do you agree to be bound by it?

THE DEFENDANT: I do.

THE COURT: I'm sorry?

THE DEFENDANT: I do.

THE COURT: I will allow you, then, Mr. Pace, to prepare the documents concerning dismissal.

MR. PACE: That's fine.

THE COURT: Thank you to both of you.

MR. MCPHEE: If I may, again, with benefit of the record, I will be out of town between the 16th and 28th. This will be due on the 28th. I have no problem with Mr. Pace contacting Mr. Lietz directly or Mr. Lietz contacting Mr. Pace directly to arrange for payment and delivery.

THE COURT: Now, a clear understanding, Mr. Lietz, that you may contact Mr. Pace pursuant to what Mr. McPhee has represented, but you are not, under any circumstances, to contact the plaintiff directly. All right?

THE DEFENDANT: Yes.

THE COURT: Is there anything further at this time?

MR. PACE: No.

THE COURT: That takes care of it. Thank you. The best of luck everybody.

(Discussion off the record.)

THE COURT: Let me indicate for the record that Mr. McPhee has represented he has no problem with Mr. Pace tendering the order without Mr. McPhee's written approval as to form and content. And I know Mr. Pace to be -- both counsel to be excellent attorneys with high ethical standard, and so we will rely on that representation and Mr. Pace's professionalism in that regard.

MR. PACE: Thank you, your Honor.

MR. MCPHEE: Thank you, your Honor. May we be excused?

THE COURT: Yes. Good to see all of you.

(Proceedings in the above-entitled matter were concluded.)

C E R T I F I C A T E

I, Kathleen Schultz, an Official Court Reporter for the Third Judicial District Court in and for Salt Lake County, State of Utah, do hereby certify that I reported the above-entitled matter on June 14, 1996, and that the preceding pages 1 through 9, inclusive, comprise a true and correct Reporter's Transcript of Proceedings.

Dated this 27th day of September, 1999.

Kathleen Schultz CSR

Kathleen Schultz, C.S.R.
Official Court Reporter

Jerold D. McPhee (3662)
Attorney for the Defendant
320 South 300 East, Suite 200
Salt Lake City, Utah 84111-2537
Telephone: 801.322.1616

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

MYRA MARGIS,	:	
	:	
Plaintiff,	:	Case Number: 940905177 CV
vs.	:	
	:	
BERT LIETZ,	:	Judge: Leslie A. Lewis
	:	
Defendant.	:	

MOTION TO QUASH AND RECALL WRIT OF GARNISHMENT

Comes now the Defendant, Bert Lietz, who, by and through his attorney of record, Jerold D. McPhee, hereby moves this Court for its order quashing and recalling the Writ of Garnishment, which was inappropriately applied for by the Plaintiff and erroneously issued by this Court on 26 June 2001.

In support there of the Defendant shows this Court that this matter was dismissed with prejudice on March 14, 2001 effective June 14, 1996. The attached Memorandum of Points is herein provided in support of this Motion.

///

///

Dated this 5th day of July 2001.

Respectfully Submitted,

Jerold D. McPhee
Attorney for the Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO QUASH AND RECALL WRIT OF GARNISHMENT was mailed, first class postage thereon prepaid, this 5th day of July, 2001, to:

Nathan D. Pace and David Pace
136 South Main Street, Suite 404
Salt Lake City, Utah 84101

THIRD DISTRICT COURT - SLC COURT
SALT LAKE COUNTY, STATE OF UTAH

MYRA MARGIS, Plaintiff,	:	NOTICE OF PRETRIAL/SCHEDULING CONFERENCE
vs.	:	Case No: 940905177 CV
BERT LIETZ, Defendant.	:	Judge: LESLIE LEWIS Date: May 13,1998

PRETRIAL/SCHEDULING CONFERENCE is scheduled.
Date: 08/14/1998
Time: 04:00 p.m.
Location: Fourth Floor - N44
THIRD DISTRICT COURT
450 SOUTH STATE
SLC, UT 84111-1860

COUNSEL ARE TO HOLD MEANINGFUL SETTLEMENT DISCUSSIONS PRIOR TO THIS HEARING AND ARE TO BE PREPARED TO REPORT ON ISSUES RESOLVED AND ISSUES IN CONFLICT. IF THE CASE CANNOT BE SETTLED, A TRIAL DATE WILL BE SCHEDULED.

THE COURT MAY IMPOSE OTHER SANCTIONS, SUCH AS AWARD OF ATTORNEY'S FEES TO OPPOSING PARTIES, AS MAY SEEM JUST IN THE CASE.

BOTH COUNSEL AND PARTIES WITH AUTHORITY TO SETTLE THE LAWSUIT MUST BE PRESENT.

Dated this 13 day of May, 1998.

LESLIE LEWIS
District Court Judge

SALT LAKE COUNTY, SALT LAKE CITY
STATE OF UTAH
DISTRICT COURT

Case No: 940905177
Date: May 13, 1998

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 940905177 by the method and on the date specified.

METHOD	NAME
Mail	JEROLD D. MCPHIE 336 SOUTH 300 EAST SUITE 200 SALT LAKE CITY, UT 841112504
Mail	NATHAN D. PACE 136 SOUTH MAIN SUITE 404 SALT LAKE CITY UT 841010000

Dated this 21 day of May, 1998.

M Small
Deputy Court Clerk

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court at 801-238-7391 at least three working days prior to the proceeding.

NATHAN D. PACE, (6626)
136 SOUTH, MAIN STREET SUITE 404
SALT LAKE CITY, UTAH 84101
TELEPHONE: (801) 355-9700
Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

MYRA MARGIS,	:	MOTION FOR CONTEMPT
	:	AND TO STRIKE ANSWER
Plaintiff,	:	AND ENTER JUDGMENT
	:	
v.	:	Civil No. 940905177CV
	:	
BERT LIETZ,	:	
	:	
Defendant.	:	Judge: Leslie Lewis

COMES NOW Plaintiff, by and through her attorney Nathan D. Pace, and hereby moves the Court for an Order holding the Defendant in Contempt for failing to comply with the previously entered settlement stipulation before the Court, and if the Defendant fails to appear at the August 14, 1998 pretrial conference and otherwise comply with the Court order of holding meaningful settlement discussions prior to that Conference, that the Court should Strike defendant's answer and enter a default judgment on behalf of the plaintiff in this case.

Plaintiff requests this motion be heard and argued by parties before the Court at the Pretrial scheduled for August 14, 1998 at 4:00pm.

The Parties previously came before the Court and prior to trial entered into and agreed to a stipulated settlement which was placed on the record by the Court and approved by the Court. Among the terms and as part of that stipulation, the Defendant was required to deliver the sum of $900.00 to the plaintiff and make an accounting of the items taken from the Plaintiff. The parties met at an appointed time to deliver the items to the Plaintiff and the delivered items were inventoried by Counsel for Plaintiff. Defendant handed counsel for Plaintiff a check for $900.00 at that time. Counsel for Plaintiff requested that Defendant initial the inventory list when the delivery was completed, Defendant refused. When counsel again requested that he initial the inventory list, Defendant ripped the $900.00 check from counsel for Plaintiff's hand, and drove away in his truck, nearly running over Plaintiff.

Several times during the ensuing months, Counsel for Plaintiff and Counsel for Defendant would discuss this matter. Counsel for Defendant would state that he was having a hard time communicating with his client, but that he would get him to redeliver the check as previously agreed to. However the check has never been delivered. As such, since the Defendant has shown a complete unwillingness to comply with the previous and what was intended to be a final stipulation and order of the Court regarding this matter, the Plaintiff moves the Court to hold the Defendant in Contempt for failing to Comply.

Further, the Court has ordered the parties appear on August 14, 1998 at 4:00pm for a pretrial conference and to have held meaningful discussions as to settlement prior to that date. Counsel for Plaintiff believes that neither defendant nor Counsel for Defendant will attend nor will

they participate in discussions prior to the hearing. If Defendant's do not participate in good faith settlement discussions and if they do not attend the August 14, 1998 hearing, Plaintiff moves the Court to strike the Defendant's Answer in this matter and immediately enter a default judgment for the Plaintiff according to the terms contained in Plaintiff's complaint.

Plaintiff should not be continually punished for Defendant's unwillingness to abide by the previous Order of the Court.

Plaintiff further asks the Court to order Defendant to pay to Plaintiff an award of $2,500 in attorneys fees in this matter which represent 20 hours at $125.00 which has been a more than reasonable amount of fees charged in this matter to date by Counsel for Plaintiff.

DATED THIS 31 day of July, 1998.

Nathan D. Pace
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of July, 1998, I had a true and correct copy of the foregoing Motion sent by U.S. Mail, postage prepaid to the following:

Jerold D. Mcphee
336 South 300 East #200
Salt Lake City, Utah 84111

THIRD DISTRICT COURT - SLC COURT
SALT LAKE COUNTY, STATE OF UTAH

MYRA MARGIS, Plaintiff,	:	MINUTES PRETRIAL CONFERENCE
vs.	:	Case No: 940905177 CV
BERT LIETZ, Defendant.	:	Judge: LESLIE LEWIS Date: August 14, 1998

Clerk: chells

PRESENT

Plaintiff(s): MYRA MARGIS
Plaintiff's Attorney(s): NATHAN D. PACE
Video

HEARING

Based on the failure to appear of the defendant and his counsel the Court grants attorney fees in the amount of $480.00, further the plaintiff is awarded travel costs in the amount of $500.00. The defendant is to pay the amounts before the case will proceed to trial or hearing.
At the next hearing the plaintiff may appear by telephone.
The court orders failure to appear by the defendant or an attorney for the defendant (Mr McPhie or partners) will result in the defendant pleadings being stricken and a judgment will enter for the plaintiff. The next hearing is set for 8/21/98 at 4:00 pm

Counsel for the plaintiff is to send notice by mail and by fax to Mr McPhie.

THIRD DISTRICT COURT-SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

MYRA MARGIS, Plaintiff,	:	MINUTE ENTRY RE: MOTION TO SET ASIDE
vs.	:	Case No: 940905177
BERT LIETZ, Defendant.	:	Judge: LESLIE A. LEWIS Date: 10/27/2000

Clerk: chells

A notice to submit has been filed, pursuant to rule 4-501, code of Judicial Administration, in connection with the defendant's Motion to Set Aside Judgemnt and Award of Attorneys Fees. The Court after having considered the motion and reviewing all the pleadings and the court's file, the Court denies the motion. The previous Order and Award of Fees remains in place.

Judge LESLIE A. LEWIS

11-15-00

Case No: 940905177
Date: Oct 27, 2000

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 940905177 by the method and on the date specified.

METHOD	NAME
Mail	JEROLD D. MCPHEE ATTORNEY DEF 336 SOUTH 300 EAST SUITE 200 SALT LAKE CITY, UT 841112504
Mail	NATHAN D. PACE ATTORNEY PLA 136 S MAIN ST SUITE 404 SALT LAKE CITY UT 841010000

Dated this 17 day of Nov, 20 00.

M Smith
Deputy Court Clerk

Jerold D. McPhee (3662)
Attorney for the Defendant
320 South 300 East, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 322-1616

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

MYRA MARGIS,	:	
	:	NOTICE TO SUBMIT
Plaintiff,	:	FOR DECISION
	:	
vs.	:	
	:	Case No. 940905177 CV
BERT LIETZ,	:	
	:	Judge: Leslie A. Lewis
Defendant.	:	

The following motion(s), as provided pursuant to the provisions of Rule 4-501(d) of the UTAH CODE OF JUDICIAL ADMINISTRATION, are now at issue and ready for decision of the court. The documents indicated have been filed with the court.

1. (a) Type of motion: DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S RESPONSE

(b) Date filed: October 15, 1998

(c) Party filing motion: DEFENDANT

(d) _____ Affidavit in support

(e) __XX__ Memorandum in support

(f) _____ Affidavit in opposition

(g) _____ Memorandum in opposition

(h) _____ Memorandum in reply

(i) _____ Other pleading(s) necessary to determine motion (specify): _____

2. (a) Type of motion: DEFENDANT'S PROPOSED ORDER REGARDING THE DEFENDANT'S MOTION TO SET ASIDE JUDGMENT AND AWARD OF ATTORNEYS FEES.

(b) Date filed: November 24, 2000

(c) Party filing motion: DEFENDANT

(d) _____ Affidavit in support

(e) _____ Memorandum in support

(f) _____ Affidavit in opposition

(g) _____ Memorandum in opposition

(h) _____ Memorandum in reply

(i) _____ Other pleading(s) necessary to determine motion (specify):

3. (a) Type of motion: PLAINTIFF'S OBJECTION TO DEFENDANT'S PROPOSED ORDER REGARDING DEFENDANT'S MOTION TO SET ASIDE JUDGMENT AND AWARD OF ATTORNEYS FEES.

(b) Date filed: December 4, 2000.

(c) Party filing motion: PLAINTIFF

(d) _____ Affidavit in support

(e) _____ Memorandum in support

(f) _____ Affidavit in opposition

(g) _____ Memorandum in opposition

(h) _____ Memorandum in reply

(i) _____ Other pleading(s) necessary to determine motion (specify): _____

4. (a) Type of motion: PLAINTIFF'S MOTION FOR THE RELEASE OF FUNDS.

(b) Date filed: December 4, 2000.

© Party filing motion: PLAINTIFF

(d) _____ Affidavit in support

(e) _____ Memorandum in support

(f) _____ Affidavit in opposition

(g) _____ Memorandum in opposition

(h) _____ Memorandum in reply

(I) _____ Other pleading(s) necessary to determine motion (specify): _____

5. (a) Type of motion: DEFENDANT'S OBJECTION TO PLAINTIFF'S PROPOSED ORDER REGARDING DEFENDANT'S MOTION TO SET ASIDE JUDGMENT AND AWARD OF ATTORNEYS FEES.

(b) Date filed: December 8, 2000.

© Party filing motion: DEFENDANT

(d) _____ Affidavit in support

(e) _____ Memorandum in support

(f) _____ Affidavit in opposition

(g) _____ Memorandum in opposition

(h) _____ Memorandum in reply

(i) _____ Other pleading(s) necessary to determine motion (specify): _____

6. (a) Type of motion: DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR THE RELEASE OF FUNDS.

(b) Date filed: December 11, 2000.

(c) Party filing motion: PLAINTIFF

(d) _____ Affidavit in support

(e) _____ Memorandum in support

(f) _____ Affidavit in opposition

(g) _____ Memorandum in opposition

(h) _____ Memorandum in reply

(i) _____ Other pleading(s) necessary to determine motion (specify): _____

DATED this 6 day of February, 2001.

Respectfully submitted,

for Jerold D. McPhee
Attorney for the Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing NOTICE TO SUBMIT FOR DECISION was mailed, first class postage thereon prepaid, this 14th day of February, 2001, to:

Nathan D. Pace and David Pace
136 South Main Street, Suite 404
Salt Lake City, Utah 84101

William A. Arnold

JEROLD D. MCPHEE #3662
320 SOUTH 300 EAST, SUITE #200
SALT LAKE CITY, UTAH 84111-2537
(801) 322-1616

IN THE UTAH COURT OF APPEALS

MYRA MARGIS,	}	
PLAINTIFF/APPELLEE,	}	CASE NUMBER: 940905177CV
V.	}	
BERT LIETZ,	}	APPLLEANT COURT NO.:
DEFENDANT/APPELLANT.	}	

CERTIFICATE THAT TRANSCRIPT IS NOT REQUIRED

Appellant, Bert Lietz, by and through counsel, Jerold d. McPhee, certifies to the court that no transcript will be requested in the above-entitled action. The court file has the transcript, which will be used in this matter. It was prepared on 14 June 1996, and was filed the court on 28 August 1999. We will rely on any other transcript, which is contained in the court record.

Dated this 1 day of Oct, 2001.

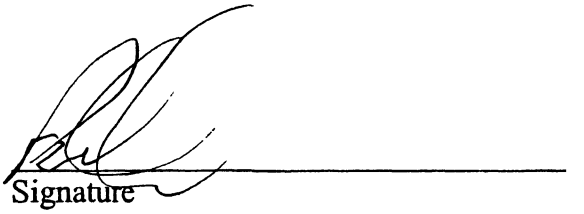
Jerold D. McPhee
Attorney for the Defendant and Appellant

Certificate that Transcript is not Required
District Court Case Number: 940905177CV
Appellant Court Number:
Plaintiff/Appellee: Myra Margis
Defendant/Appellant: Bert Lietz

CERTIFICATE OF SERVICE BY MAIL

I certify that on this 1 day of Oct, 2001, I personally placed a true and correct copy of the foregoing in a sealed envelope. I further certify that I placed the same in the United States Postal System, postage prepaid, and addressed to the following:

Nathan and David Pace
136 South Main Street, Suite #404
Salt Lake City, Utah 84101



Signature